82-1243

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RICHARD D. BUNKER,

Appellant,

v.

NATIONAL GYPSUM COMPANY,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF INDIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Does the Indiana Workmen's Occupational Diseases Act violate the Appellant's right to remedy for an injury done and to due process of law under the fifth and fourteenth amendments to the Constitution of the United States, when applied to raise a bar to a cause of action for Appellant's sole remedy prior to its accrual?

Whether the Indiana Workmen's Occupational Diseases Act violates the Appellant's right to remedy for injury done and to due process of law under the fifth and fourteenth amendments to the Constitution of the United States when applied so that his exclusive remedy does not accrue until after the running of the statute of limitations?

Whether the Indiana Workmen's Occupational Diseases Act violates the ban on the granting of special privileges and immunities, causing a discrimination and denial of the equal protection of the laws under the fourteenth amendment to the Constitution of the United States by distinguishing disease caused by asbestosis from disease caused by radiation?

Whether the Indiana Workmen's Occupational Diseases Act violates the ban on the granting of special privileges and immunities, causing a discrimination and denial of the equal protection of the laws under the fourteenth amendment to the Constitution of the United States by distinguishing those exposed to asbestos in the past but not recently from those continuously exposed?

PARTIES APPEARING

RICHARD D. BUNKER
Plaintiff-Appellant

NATIONAL GYPSUM COMPANY
Defendant-Appellee

THE INDIANA LEGAL FOUNDATION
Amicus Curiae to the Supreme Court of the State of Indiana

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OPINIONS BELOW

Bunker v. National Gypsum Company, ___ Ind. ___, 441 N.E.2d 8 (1982) (appendix pages 1a-25a), vacating decision:

Bunker v. National Gypsum Company, ___ Ind. App. ___, 426 N.E.2d 422 (1981) (appendix pages 27a-37a).

Full Industrial Board of Indiana, Single Hearing Member, Everett Lucas (appendix pages 38a-45a), companion case:

Bunker v. National Gypsum Company, ___ Ind. App. ___, 406 N.E.2d 1239 (1980) (appendix pages 46a-50a).

JURISDICTION

Appellant claimed under the Indiana Workmen's Occupational Diseases Act for temporary total disability compensation from the National Gypsum Company, Appellee, his prior employer. A Motion to Dismiss was filed by Appellee based solely upon the timeliness of the Appellant's claim. The Single Hearing Member granted this Motion on December 26, 1979, and this decision was adopted by the Full Industrial Board of Indiana, May 15, 1980. Appeal to the Third District Court of Appeals resulted in reversal and remand with the finding that the statute set up as a bar was unconstitutional; denied to Appellant, and those similarly situated the right to remedy for injury done; failed the privileges and immunitues test of the Indiana Constitution; and denied Appellant the due process of law. This opinion was filed September 29, 1981, and rehearing was denied November 30, 1981. The Indiana Supreme Court granted Appellee's Petition for Transfer, with opinion vacating the decision of the Court of Appeals, on October 26, 1982. Notice of Appeal was filed with the Supreme Court of the State of Indiana on Monday, December 27, 1982; the 60th day from the decision having fallen upon Christmas Day, the next day being Sunday; being the first day after the 60th day with Court hours.

This appeal is being docketed in this Court within 90 days from the date of the granting of Appellee's Petition for Transfer below. This Court's jurisdiction is invoked pursuant to 28 U.S.C., Section 1257(2). Due to the public interest in the constitutionality of a statute of the State of Indiana, notice of this appeal has also been served upon the Attorney General for the State of Indiana, as well as the Clerk of the Full Industrial Board of the State of Indiana, per 28 U.S.C. Section 2403(b) and Rule 28.4(c), Rules of the Supreme Court (see Appendix, page 51a). No Court has certified to the State Attorney General for the State of Indiana that the constitutionality of the statute complained of is in question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves:

a) **United States Constitution**

U.S. Const. Amend. V.

U.S. Const. Amend. XIV, section 1.

b) **Indiana Constitution**

Ind. Const. Art. I, Section 12.

Ind. Const. Art. 1, Section 23.

c) **Statutes of the State of Indiana.**

1937 Ind. Acts. C. 69, found within:

Indiana Code Section 22-3-7-1, *et seq.* (1974), specifically:

Ind. Code Section 22-3-7-9 (1974);

Ind. Code Section 22-3-7-32(c) (1974).

All pertinent parts are contained verbatim at Appendix, pages 53a through 91a.

STATEMENT OF THE CASE

Plaintiff-Appellant was employed by the Defendant-Appellee in February, 1949 and, arising out of and in the course of this employment, was exposed to asbestos fibers. Plaintiff's last exposure was in November, 1950, though he was employed by the Defendant until March 31, 1966. Plaintiff was temporarily totally disabled, arising from the disease asbestosis, on July 23, 1976. Medical evidence connected Plaintiff's continuous exposure to the hazards of asbestosis with his exposure while in Defendant's employ. Plaintiff filed his Application for Adjustment of Claim, per the Indiana Workmen's Occupational Diseases Act, on June 17, 1978.

Concurrently with the filing of Plaintiff's Application for Adjustment of Claim, Plaintiff filed an action sounding in negligence and asserting his right to a common law remedy. In affirming the dismissal of the Trial Court, the Court of Appeals of the State of Indiana determined that Plaintiff's exclusive remedy lay under the provisions of the Indiana Workmen's Occupational Diseases Act and, further, that Plaintiff's cause of action under that Act did not accrue until the date of first disablement, July 23, 1976.

At hearing before the Single Member of the Industrial Board, Plaintiff asserted that the granting of a Motion to Dismiss based upon the timeliness of Plaintiff's claim would deprive the Plaintiff of a property right, his claim for injury done, without due process of law and in denial of Plaintiff's right to equal protection under the law. The Single Hearing Judge determined that the statutory plan bore a rational relationship to the State's interest in providing a predictable loss pattern for the setting of insurance rates and that equal protection was not denied by excepting radiation-caused injuries from the same

requirements. The Full Industrial Board affirmed and adopted the Single Hearing Member's decision.

Pursuant to Appellate Rule 4(C), Indiana Rules of Appellate Procedure, Plaintiff appealed the final decision of the Full Industrial Board of Indiana to the Court of Appeals of Indiana. Plaintiff challenged, in his issues presented to the Court of Appeals, the Industrial Board's definition of the term "last exposure" as well as the denial of Plaintiff's constitutional rights by the Indiana Workmen's Occupational Diseases Act, as construed and applied. The Court of Appeals, in its analysis of these constitutional claims, found that the requirement that a claim be filed within three years of last exposure to the hazards of the disease while, at the same time, requiring that disability occur before a claim accrues, denies due process of law to Plaintiff and those similarly situated. The decision of the Court of Appeals held, not only that the statute denied Plaintiff his right to a remedy for injury done, but, also, that no rational basis existed for dividing exposed workers for purposes of coverage into those continually exposed to asbestos and those not, thus failing the privileges and immunities test under Article I, Section 23, of the Indiana Constitution, implying denial of equal protection of the laws under U.S. Constitution, Amendment XIV, Section I. Upon the decision of the Court of Appeals of Indiana, the Appellee petitioned for transfer to the Supreme Court of the State of Indiana. The Supreme Court of the State of Indiana vacated the decision of the Court of Appeals, finding that the act of the legislature in limiting the time for the bringing of a cause of action to three years from the date of last exposure to the hazards of the disease was constitutional, legitimately defining, on the basis of time of accrual, which disabilities would be compensable under the Act. The decision of the Supreme Court of the State of

Indiana implied that the amount of time within which Plaintiff's exclusive remedy claim should be brought was reasonable regardless of the fact that Plaintiff's claim could not be brought within that time; regardless that Plaintiff's claim did not accrue until after the running of that period.

SUBSTANTIAL QUESTION

1. This Case Presents Issues Of General Importance Directed To Legislative Enactment Of "Statutes Of Repose" And Due Process Of Law Under The U.S. Constitution.

This case presents the Court with a clear opportunity to determine whether so-called "statutes of repose," prescribing the running of a statute of limitations from a date different from that upon which the action accrues, are consistent with the protections insured by the Constitution of the United States when applied so that the statute bars a claim even before the date of accrual of the claim, as set by the same statute, in derogation of the common law and vested rights.

2. The Opinion Below Decides The Federal Constitutional Question In A Way Which Conflicts With The Opinions Of Other State Courts Of Last Resort.

The finding of the Supreme Court of the State of Indiana is in conflict with rulings made by Supreme Courts in other states of the United States on similar issues of "statutes of repose" and upon similar grounds. *See, e.g., Diamond v. E. R. Squibb & Sons, Inc.*, ___ Fla. ___, 397 So. 2d 671 (1981); *Lankford v. Sullivan,*

___ Ala. ___, ___ So. 2d ___ (1982); *Pepsi-Cola Bottling Co. v. Long*, ___ Miss. ___, 362 So. 2d 182 (1978).

Aside from the differences of opinion between the states concerning the constitutionality of provisions like the one at issue here, the application of the statute in the manner upheld by the Supreme Court of the State of Indiana here, allows the legislature of the State of Indiana to deprive the citizens of property without due process of law by so defining a property right so as to not accrue until after a bar has arisen to its assertion.

3. The Opinion Below Deprives Plaintiff And Others Similarly Situated Of The Equal Protection Of The Law.

Finally, upholding the statute as applied here allows the legislature of the State of Indiana to distinguish between individuals similarly situated, in an arbitrary, capricious, and unreasonable manner, which results in discrimination, abridging the constitutional right to equal protection under the law and the constitutional ban on the granting of special privileges and immunities. The statutory provisions applied to Plaintiff distinguished the hazards of disease resulting from exposure to asbestos from the hazards of disease resulting from radiation. No reasonable distinguishing feature was proved or even asserted at any stage in these proceedings. Further, distinguishing Plaintiff, who was exposed to asbestos but did not suffer disablement from the disease until more than three years subsequent to the last exposure, from the claimants who suffer continual exposure for the same period, allowing the latter to be compensated, is an arbitrary, capricious, and unreasonable distinction for which no legitimate or reasonable basis was proved

or asserted within the intent of the Indiana Workmen's Occupational Diseases Act.

This Court has long fulfilled its true role as the people's last line of defense against invasion of the rights retained by them in their compact of government. Plaintiff and those similarly situated, stricken by disease arising out of employment long past, have been placed at the mercy of enactments so unreasonable as to completely ban their causes of action while others, without a legitimate basis for distinction, are allowed compensation. The Indiana Supreme Court's determination that application of this statute in this manner is constitutionally proper, must be reviewed by this Court, as the final arbiter of all serious constitutional questions.

CONCLUSION

The Indiana Supreme Court, through its approval of the Indiana Workmen's Occupational Diseases Act, has given constitutional imprimatur to an application of law barring causes of action prior to their accrual as well as distinguishing individuals on the basis of arbitrary, capricious, and unreasonable grounds. The conflict of this decision with that of other States, as well as its basic abridgement of due process and equal protection rights, requires intercession by this Court and plenary consideration of the law involved. For all of the reasons

expressed herein, Appellant respectfully suggests that this Court note probable jurisdiction of this Appeal, reverse the finding of the Industrial Board and remand this case for appropriate proceedings.

Respectfully submitted,

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APPENDIX A

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IN THE
SUPREME COURT OF INDIANA

Supreme Court No. 1082 S 403
No. 2-680 A 179 in the Court of Appeals

[Filed: Oct. 26, 1982]

Richard D. Bunker,
Appellant,

v.

National Gypsum Company,
Appellee.

APPEAL FROM THE
FULL INDUSTRIAL BOARD OF INDIANA
Cause No. 84488

OPINION

PIVARNIK, J.

This cause comes to us on a Petition for Transfer from the Third District Court of Appeals. Plaintiff-Appellant-Respondent, Richard D. Bunker, discovered in July, 1976, that he was afflicted with asbestosis. On June 17, 1978, he applied to the Industrial Board of Indiana for disability benefits under the "Indiana Workmen's Occupational Diseases Act." He alleged that his permanent disability was due to the work-related exposure to asbestos dust. The Industrial Board held that Respondent's claim was barred by the statute of limitations provision of the Occupational Diseases Act. Specifically, the Board found that Respondent's disability had not arisen within three years of the date of his last job-related exposure and therefore was not compensable. On appeal, two of the three judges for the Third District found the statute of limitations unconstitutional and reversed the Industrial Board. Defendant-Appellee-Petitioner, the National Gypsum Company, subsequently brought this Petition for Transfer. We find the Court of Appeals in error and accordingly vacate their opinion and affirm the Industrial Board.

The material facts in this case are not in dispute. They show that Mr. Bunker was first employed by the National

Gypsum Company in February, 1949. From that time until November, 1950, he was regularly exposed to asbestos fibers while supervising a blending process for the manufacture of an accoustical treatment product. In November, 1950, he was permanently transferred to other work not involving asbestos. Mr. Bunker voluntarily left National Gypsum's employ in March, 1966. In July, 1976, Mr. Bunker underwent exploratory surgery and was diagnosed as suffering from asbestosis.

In Respondent's appeal of a companion action sounding in negligence, the Third District held that Respondent's exclusive remedy lay under Indiana's Occupational Diseases Act. *Bunker v. National Gypsum Co.*, (1980) ___ Ind.App. ___, ___, 406 N.E.2d 1239, 1241. The Court of Appeals also noted that no benefit claim can accrue unless and until an occupational disease actually causes disablement or death. *Id.* In adjudging Respondent's instant action under the Occupational Diseases Act, the Third District found that the Act's three year statute of limitations represents a violation of Respondent's constitutional right to due process and therefore must be nullified. That Court held:

> "In view of the discovery of this factual information about the disease since the legislature imposed the three-years-from-exposure limitation in 1937, it appears to us that the statute can no longer stand. To impose its ban is to violate the classic constitutional mandate, because to do so amounts to a practical denial of the very right to recovery that the statute was intended to provide."

Bunker v. National Gypsum Co., (1981) ___ Ind.App. ___, ___, 426 N.E.2d 422, 425.

The section of the "Indiana Workmen's Occupational Diseases Act" at issue is Ind. Code §22-3-7-9(e) (Burns 1974):

"(e) *No compensation* shall be payable for or on account of any occupational diseases *unless disablement,* as herein defined, appears within two [2] years after the last day of the last exposure to the hazards of the disease except in cases of occupational diseases caused by the inhalation of silica dust or asbestos dust and in such cases, *within three [3] years after the last day of the last exposure* to the hazards of such disease: Provided, That in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement, as herein defined, occurs within two [2] years from the date in which the employee had knowledge of the nature of his occupational disease or, by exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment." (emphasis added).

Ind. Code §22-3-7-9(e) (Burns 1974) provides that compensation will be payable for a disability resulting from an exposure to asbestos only if the disability arises within three years of the *date of last exposure.* This legislation is very explicit. For example, the statute distinguishes asbestos-related disabilities from disabilities due to occupational disease caused by radiation exposure. In radiation cases, compensation is payable only if disability occurs within two years of the *date on which the employee discovers* or reasonably should have discovered his disease and its relationship to his employment.

Since the undisputed facts before the Industrial Board show that Respondent's last job-related exposure to asbestos dust was in November, 1950, the statute of limitation in this case began to run at that time. The facts also show that Respondent discovered his disability in July, 1976, leading us to the conclusion that his disa-

bility arose approximately twenty-three years after the deadline dictated by the Occupational Diseases Act. The facts clearly indicate, therefore, that Respondent's asbestos-related disability arose after the expiration of the statutory period within which all asbestos-related disability claims must have been brought.

Respondent seeks to avoid the direct application of the three year limitation period and to circumvent a foreclosure of his claim by arguing that "it would abridge his constitutional right to a remedy to say that the time for claiming the remedy had passed even before it accrued." He offers this due process argument as a reason for finding the limitation provision unconstitutional. The Court of Appeals essentially adopted Respondent's argument. In so doing, they took it upon themselves to independently consider and evaluate the nature of asbestosis. The Court of Appeals introduced medical evidence suggesting that the occurrence and causation of asbestosis is not dependent upon a long continued exposure to asbestos. Other evidence was presented, however, which clearly indicates a direct correlation between the number of years of exposure to asbestos and the incidence of asbestosis. They also reported that after a person is exposed to asbestos, there is a long period of latency before asbestosis can be diagnosed. Based upon these findings, the Court of Appeals deemed Respondent entitled to protection under the Occupational Diseases Act.

We now find that the Court of Appeals must be reversed because they erred in the following two respects:

1. they erred by finding the statute of limitations imposed by the Occupational Diseases Act to be unconstitutional; and

2. they erred by using medical evidence found outside the record of this case to justify their opinion.

I

Our duty in construing an Indiana statute is to give effect to the intention of our legislature. This is because the Indiana Constitution explicitly vests in the General Assembly the exclusive power to legislate. Ind. Const. art. 4, §1. This Court has repeatedly warned that the judiciary must not usurp the constitutional function of the legislature. We have held:

> "A statute is not unconstitutional simply because the court might consider it born of unwise, undesirable or ineffectual policies."

Johnson v. St. Vincent Hospital, (1980) ___ Ind. ___, ___, 404 N.E.2d 585, 591. This Court and the Court of Appeals must not, therefore, substitute judicial judgment for legislative judgment in legislative matters that neither affect fundamental rights nor proceed along suspect lines. *Short v. Texaco, Inc.,* (1980) ___ Ind. ___, ___, 406 N.E.2d 625, 632, *aff'd,* ___ U.S. ___, 102 S.Ct. 781. 70 L.Ed.2d 738 (1982); *see also: Indiana Aeronautics Commission v. Ambassadair, Inc.,* (1977) 267 Ind. 137, 147, 368 N.E.2d 1340, 1346, *cert. denied,* 436 U.S. 905, 98 S.Ct. 2235, 56 L.Ed.2d 403 (1978). Further, an act of the legislature must be afforded a presumption of constitutionality. Accordingly, the burden to rebut this presumption is upon any challenger and all reasonable doubts must be resolved in favor of an act's constitutionality. *Daque v. Piper Aircraft Corp.,* (1981) ___ Ind. ___, ___, 418 N.E.2d 207, 214, *reh. denied.* These are well established rules. This Court has repeated and elaborated upon these rules in *Sidle v. Majors,* (1976) 264 Ind. 206, 208, 341 N.E.2d 763, 766, *reh. denied,* as follows:

"In approaching a consideration of the constitutionality of a statute, we must at all times exercise self restraint. Otherwise, under the guise of limiting the Legislature to its constitutional bounds, we are likely to exceed our own. That we have the last word only renders such restraint the more compelling. We, therefore, remind ourselves that in our role as guardian of the constitution, we are nevertheless a court and not a 'supreme legislature.' *We have no right to substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives.* We are under a constitutional mandate to limit the General Assembly to its lawful territory of prohibiting legislation which, although enacted under the claim of a valid exercise of police power, is unreasonable and oppressive. Nevertheless, we recognize that the Legislature is vested with a wide latitude of discretion in determining public policy. Therefore, *every statute stands before us clothed with the presumption of constitutionality, and such presumption continues until clearly overcome by a showing to the contrary. In the deliberative process, the burden is upon the challenger to overcome such presumption, and all doubts are resolved against his charge.*" (Emphasis added.)

See also: Shettle v. McCarthy, (1981) ___ Ind. ___, ___, 423 N.E.2d 594, 597; *Dept. of Financial Institutions v. Holt,* (1952) 231 Ind. 293, 300, 108 N.E.2d 629, 633. In short, while appellate courts may review the power of the legislature to act, they must not evaluate the policies adopted by the legislature.

As with other legislation, legislative statutes of limitations carry a general presumption of constitutionality. We have previously noted:

"Formerly, statutes of limitations were looked upon with disfavor in that they are invariably in

derogation of the common law. 'Now, however, the judicial attitude is in favor of statutes of limitations, rather than otherwise, since they are considered as statutes of repose and as affording security against stale claims. Consequently, except in the case of statutes of limitations against the government, the courts are inclined to construe limitation laws liberally, so as to effect the intention of the legislature.' 51 Am.Jur.2d, Limitation of Actions §50, (1970). Such statutes rest upon sound public policy and tend to the peace and welfare of society and are deemed wholesome. *Horvath v. Davidson,* (1970) 148 Ind.App. 203, 264 N.E.2d 328; *Sherfey v. City of Brazil,* (1938), 213 Ind. 493, 13 N.E.2d 568; *High et al. v. Board of Commissioners of Shelby County,* (1883) 92 Ind. 580, 589."

Shideler v. Dwyer, (1981) ___ Ind. ___ , ___ , 417 N.E.2d 281, 283. A statute of limitations will comport with the constitutional demand for due process so long as it provides a reasonable time for the bringing of an action. *Ochoa v. Hernandez y Morales,* (1913) 230 U.S. 139, 161, 33 S.Ct. 1033, 1042, 57 L.Ed.2d 1427, 1438; *Guthrie v. Wilson,* (1959) 240 Ind. 188, 194, 162 N.E.2d 79, 81. In *Guthrie,* we quoted from *Sansberry v. Hughes,* (1910) 174 Ind. 638, 640, 92 N.E. 783, 784, as follows:

"In respect to substantive rights, conferred by law, or acquired by contract, there is no doubt of constitutional protection without modification or change. It is otherwise with a mere remedy. A remedy is nothing more than the means provided by law for the enforcement of rights, and is not of itself a right, except that when there exists but a single remedy for the forcement of a vested right, such remedy cannot be wholly taken away, without providing some other reasonably convenient and effi-

> cient means of enforcement, without violating the Constitution, since a withdrawal of all legal means for the enforcement of a right is equivalent to a subversion of the right itself. But as pertaining to a mere remedy, there exists no doubt of legislative power to make such changes therein as to it seems fit, if in so doing it preserves or provides a reasonable means and opportunity for full enjoyment of the right. *Pritchard v. Spencer* (1851), 2 Ind. 486; *Board, etc. v. Center Tp.* (1896), 143 Ind. 391, 403, 42 N.E. 808; *Kepler v. Rinehart* (1904), 162 Ind. 504, 70 N.E. 806; Cooley, Const. Lim. (6th ed.) 346."

The legislature has the sole duty and responsibility to determine what constitutes a reasonable time for the bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice. *Wilson v. Iseminger,* (1902) 185 U.S. 55, 63, 22 S.Ct. 573, 576, 46 L.Ed. 804, 808; *see also: Antoni v. Greenhow,* (1883) 107 U.S. 769, 775, 2 S.Ct. 91, 96, 27 L.Ed. 468, 471.

This Court has previously upheld the authority of the legislature to alter a statutory, pecuniary right by the adoption of a statutory period of limitation shortening the time within which a claim can be brought. In *Wright-Bachman, Inc. v. Hodnett,* (1956) 235 Ind. 307, 133 N.E.2d 713, a constitutional challenge was made to the statute of limitations in Indiana's Workmen's Compensation Act. Affirming the validity of that limitation, this Court held:

> "We recognize the general rule that the legislature is the primary judge as to whether the time allowed by a statute of limitations is reasonable. Although the determination of the legislature is reviewable by the courts, the courts will not inquire into the

> wisdom of the legislative decision in establishing the period of legal bar, unless the time allowed is so short that the statute amounts to a practical denial of the right itself and becomes a denial of justice."

Id., 235 Ind. at 323, 133 N.E.2d at 720.

The Court of Appeals has contravened settled case law in finding the statute of limitations of the Occupational Diseases Act unconstitutional. This same issue was decided by the Appellate Court in 1958. *Woldridge v. Ball Brothers Co., Inc.*, (1958) 129 Ind.App. 420, 150 N.E.2d 911, *trans. denied.* In *Woldridge*, the claimant sought to be awarded benefits for his total and permanent disability due to his work-related exposure to silica dust. The full Industrial Board found that the claimant had not been exposed to silica dust during the last three years of his employment and that his disablement had not occurred within three years of his last silica exposure. Accordingly, the Appellate Court denied the claim pursuant to the same statute of limitations now at issue.

This Court has previously decided upon the constitutionality of the time limitations incorporated into Indiana's Malpractice Act, Ind. Code §§16-9.5-1-1 through 16-95.10-5 (Burns Supp. 1982). In *Johnson v. St. Vincent Hospital, Inc.*, ___ Ind. at ___, 404 N.E.2d at 603, appellant argued that the special time limitation and legal disability provision of the Malpractice Act was contrary to his rights to due process and equal protection of the law. The challenged provision of the Act was:

> "No claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two [2] years from the date of the alleged act, omission, or neglect except that a minor under the

> full age of six [6] years shall have until his eighth birthday in which to file. This section applies to all persons regardless of minority or other legal disability." Ind. Code §16-9.5-3-1 (Burns Supp. 1982).

This provision shortened the general limitation period on actions of this type. In upholding the constitutionality of this statute of limitations, we held:

> "The general purpose of a statute of limitation is to encourage prompt presentation of claims. *United States v. Kubrick*, (1979) 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259. When any alleged tortfeasor is required to defend a claim long after the alleged wrong has occurred, the ability to successfully do so is diminished by reason of dimmed memories, the death of witnesses, and lost documents. As the years between injury and suit increase, so does the probability that the search for truth at trial will be impeded and contorted to the benefit of the plaintiff.
>
> * * *
>
> In considering this challenge we regard the traditional test of constitutionality to be applicable and that considerable deference should be accorded the manner in which the Legislature has balanced the competing interests involved. *Chaffin v. Nicosia*, [(1974) 261 Ind. 698, 310 N.E.2d 867]."

Johnson v. St. Vincent Hospital, Inc., ___ Ind. at ___, 404 N.E.2d at 604. *See also: Rohrabaugh v. Wagoner*, (1981) ___ Ind. ___, 413 N.E.2d 891, *reh. denied.*

In the case at bar, Respondent alleges and the Court of Appeals has held that the statute of limitations in Indiana's Occupational Diseases Act is unconstitutional. In questioning the wisdom of the legislature, the Court of Appeals has in effect rewritten this law thereby usurping

the legislature's constitutionally mandated function. If we were to affirm the Court of Appeals in their decision, the legislative intent to provide a definitive time period within which all occupational disease claims must be brought would be frustrated. Specifically, Ind. Code §22-3-7-9(e) would be meaningless because all disabilities caused by a work-related disease would be compensable under the Act. In addition, the statutory scheme providing for the application of a "discovery" rule only in radiation exposure cases would be subverted. We will not allow such a blatant abuse of judicial power. We have previously found constitutional a statute similar to the instant one. *See generally: Rohrabaugh, supra; Johnson, supra.* We now find the statute of limitations provision of the Occupational Diseases Act to be constitutional in all respects.

II

The Court of Appeals cited medical evidence on which it based its conclusion that the period of limitations in the Occupational Diseases Act is of such relatively short duration as to be a denial of the constitutional right to due process. We find that the Third District erred by its use of this evidence. First, we question whether the conclusions of the Court of Appeals can even be reached by an analysis of the medical authorities they relied on. The cited treatises deal with the relationship between the onset of asbestosis and the length of time one was previously exposed to asbestos. The findings purport that the incidence of asbestosis is drastically increased the longer one is exposed to asbestos. Apparently the converse is also true and a short period of exposure should result in minimal, if any, damage. The facts in this case show that Respondent was exposed to asbestos for only about twenty-two months, a relatively short period of

time. Accordingly, a legislator standing in the past may have reasonably concluded that Respondent would probably never be afflicted by asbestosis and therefore would probably never be in need of protection or relief. Second, all of the medical materials used by the Court of Appeals were found outside of the record. Scant medical evidence was presented to the Industrial Board and none comparable to that found in the Court of Appeal's opinion appears in the record of this case. We have recently held:

> "It is likewise axiomatic that appellate review of the factfinder's assessment is limited to those matters contained in the record which were presented to and considered by the fact-finder."

Hales & Hunter Co. v. Norfolk & W.Ry.Co., (1981) ___ Ind. ___ , ___ , 428 N.E.2d 1225, 1227. It was, therefore, improper for the Court of Appeals to consider this evidence in arriving at its opinion.

It is within the duties and responsibilities of the legislature to keep itself advised of the general progress of medical learning and to make the determination as to whether or not new or revised legislation is needed. Not only being so charged, the legislature is also best equipped to make this determination. A cursory examination of the legislative history of the Indiana Occupational Diseases Act shows that since its inception in 1937, the legislature has on several occasions updated the Act through amendment. In fact, the proviso which relates to occupational disabilities caused by radiation exposure was added in 1961. Again in 1974 when disabilities due to coal dust inhalation were made subject to the three year limitation period, the General Assembly indicated that it was aware of its need to review and revise the Occupational Diseases Act. If this statute requires fur-

ther updating through amendment, it remains the duty and responsibility of the legislature to do so. There are no grounds for finding any constitutional infirmity in the present form of this statute.

Transfer is hereby granted. The opinion of the Court of Appeals is reversed and vacated, and the award of the Industrial Board is affirmed.

Givan, C.J., DeBruler, and Prentice, J.J., concur.
Hunter, J., dissents with opinion.

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[Filed: Oct. 26, 1982]

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BRIEF OF *AMICUS CURIAE* THE INDIANA LEGAL FOUNDATION

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IN THE
SUPREME COURT OF INDIANA

Supreme Court No. 1082 S 403
Court of Appeals No. 2-680 A 179

RICHARD D. BUNKER,
Appellant (Plaintiff below),

v.

NATIONAL GYPSUM COMPANY,
Appellee (Defendant below).

On Petition To Transfer
Appeal From The Full Industrial Board Of Indiana
Cause No. 84488

HUNTER, J. – Dissenting.

I must respectfully dissent from the majority's disposition of National Gypsum Company's petition to transfer, wherein that company sought review of the Court of Appeals' opinion found at *Bunker v. National Gypsum Co.*, (1981) ___ Ind. App. ___ , 426 N.E.2d 422 (Hoffman, P.J., dissenting). In the context and posture of the case before us, it is not appropriate for this Court to rule on the constitutionality of the three-year statute of limitations imposed on claims for asbestos-related disablement. In reaching that question and finding the statutory limitation "constitutional in all respects," the majority has ignored the doctrine of judicial restraint in circumstances which exemplify the wisdom of that venerable principle. The majority's broad ruling is both advisory in nature and *obiter dictum* in effect.

The doctrine of judicial self-restraint is a quintessential concept in American jurisprudence – one rooted in the landmark decision of *Marbury v. Madison*, (1803) 5 U.S. (1 Cranch) 137. In short, the doctrine precludes gratuitous judicial review of constitutional questions, thereby perpetuating the delicate principles of "checks and balances" and "separation of powers" which are fundamental to our constitutional system of government. *Id.*; *see also, Rescue Army v. Municipal Court*, (1947) 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666.

The case law of this jurisdiction reflects its long-standing adherence to the doctrine. Typical of our precedent is *Indiana Ed. Employment Bd. v. Benton Community Sch.*, (1977) 266 Ind. 491, 365 N.E.2d 752, where Justice Prentice explained the basic concept of the doctrine:

> "It is true, as argued by Intervenor that courts do not pass on the constitutionality of a statute until a constitutional determination is necessarily and directly involved in a justiciable controversy and is essential to the protection of the rights of the parties concerned. *Bush v. Texas*, (1963) 372 U.S. 586, 83 S.Ct. 922, 9 L.Ed.2d 958; *Roth v. Local Union No. 1460 of Retail Clerks Union*, (1939) 216 Ind. 363, 24 N.E.2d 280. A constitutional question will not be antitipcated in advance of the necessity of deciding the constitutional issue. *Poer, Trustee v. State, ex rel.*, (1918) 188 Ind. 55, 121 N.E. 83; *N.Y. Cent. R.R. Co. v. Pub. Ser. Comm. of Ind.*, (1958) 237 Ind. 544, 147 N.E.2d 547." *Id.*, 266 Ind. at 495-6, 365 N.E.2d at 754.

Justice DeBruler elaborated on the fundamental nature of the doctrine in *Board of Commissioners of Howard Co. v. Kokomo City Plan Comm.*, (1975) 263 Ind. 282, 287-8, 330 N.E.2d 92, 96:

> "Without essential legal argument and factual matter, the court, particularly in a civil case, is justified in refusing to adjudge whether the statute complies with the commands of the constitutions, for in such case it does not 'appear from the record that there is a substantial foundation for the allegation.' *Ex Parte Sweeney*, (1890) 126 Ind. 583, 587, 27 N.E. 127; *Stout v. Hendricks*, 228 F. Supp. 568 (S.D. Ind. 1964). In the ordinary case, the party will carry this burden by formally requesting the

court to consider relevant facts of which the court may take judicial notice. *State v. Griffin,* (1948) 226 Ind. 279, 79 N.E.2d 537. If the court may not take judicial notice of the necessary factual determinations, such facts must be presented and fully developed in a suitable adversary atmosphere. *Whitcomb v. Chavis,* (1971) 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363; *Tinder v. Clarke Auto Co.,* (1958) 238 Ind. 302, 149 N.E.2d 808; *Hardin v. State,* (1970) 254 Ind. 56, 257 N.E.2d 671; Note, *Admission of Extrinsic Evidence in Cases Involving the Validity of Statutes and Ordinances in Indiana,* 35 IND L.J. 100 (1959). Even if the quality of the litigation is sufficient to support a constitutional determination, such determination will not be made if the case can be disposed of justly on non-constitutional grounds. *Passwater v. Winn,* (1967) 248 Ind. 404, 229 N.E.2d 622; *State ex rel. Codding v. Eby, Judge,* (1944) 223 Ind. 302, 60 N.E.2d 527; *Roth v. Local Union #1460 of Retail Clerks Union,* (1939) 216 Ind. 363, 24 N.E.2d 280."

Here, Bunker's claim for compensation "can be disposed of justly on non-constitutional grounds." *Id.* The majority has erred by instead addressing the constitutional question, even though we lack the full presentation and development of necessary facts which we properly deemed vital in *Board of Commissioners of Howard Co. v. Kokomo Plan Comm., supra.*

The nonconstitutional grounds upon which this Court should have disposed of this case are readily apparent in the record; there, it is revealed that claimant Bunker was not "disabled" at the time of the hearing and therefore was not eligible for benefits under the Occupational Diseases Act. Ind. Code §22-3-7-1 *et seq.* (Burns 1974). To be sure, the record reveals that Bunker suffered from asbestiosis, an often fatal lung disease.

As has been recognized, however, health insurance is not among the humanitarian purposes of the Act. The fact that a Hoosier worker contracts an occupational disease does not trigger the availability of benefits. "The *sine qua non* is disablement." *Durham Mfg. Co. et al. v. Hutchins,* (1945) 115 Ind. App. 479, 483, 58 N.E.2d 444, 446; *accord, Martinez v. Taylor Forge and Pipe Works,* (1977) 174 Ind. App. 514, 368 N.E.2d 1176.

"Disablement," as is necessary to trigger the recovery of benefits, is defined in subsection "e" of Ind. Code §22-3-7-9 (Burns 1982 Supp.):

> "(e) The term 'disablement' means the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation, or equal wages in other suitable employment and 'disability' means the state of being so incapacitated."

The cross-examination of claimant Bunker by counsel for National Gypsum Company was directed solely to the question whether he was "disabled" within the meaning of the Act. That cross-examination, which follows in its entirety, reveals that Bunker was not disabled:

CROSS EXAMINATION

[Questions by Mr. Ohleyer:]

Q. "Mr. Bunker, you terminated your employment with National Gypsum on March 31, 1966?"

A. "Yes."

Q. "How old are you now, sir?"

A. "Fifty-five (55)."

Q. "Have you been employed since March 31, 1966?"

A. "Yes, with Grain Processing Corporation."

Q. "I'm sorry, what's the name of the company?"

A. "Grain Processing Corporation."

Q. "And where are they located?"

A. "Muscatine, Iowa."

Q. "And when did you go to work for them?"

A. "May 1st or something or other."

Q. "Shortly after—"

A. "Yes, right from the one job to the other."

Q. "How did your termination at National Gypsum come about, did you voluntarily quit?"

A. "Yes."

Q. "For better employment at Grain Processing?"

A. "Yes, true."

Q. "And what type of work do you do at Grain Processing?"

A. "I'm a technical salesman."

Q. "And you are still working there today?"

A. "Yes."

MR. OHLEYER: "I have no further questions."

Although suffering from asbestiosis, Bunker obviously was not disabled from "earning full wages" equal to those he enjoyed at National Gypsum Company. He continued to work as a technical salesman for Grain Processing Corporation, the same "better employment" which had prompted him to voluntarily leave National Gypsum's employ thirteen years earlier. Not surprisingly, the record reveals that one basis for National Gypsum Company's motion to dismiss was Bunker's lack of disablement.

The majority ignores the availability of this alternative disposition and instead focuses on the constitutionality of the three-year limitations period imposed on claims for asbestos-related disablement. Even if it could be said that Bunker's lack of disablement is not an appropriate basis on which to resolve his claim, it yet remains that the facts relevant to the constitutional question have not been "presented and fully developed in a suitable adversary atmosphere," as emphasized in *Board of Commissioners of Howard Co. v. Kokomo City Plan Comm., supra.*

That dearth of evidence is not the fault of the parties. Rather, it is the product of our own case precedent.

In *Wilson v. Review Board of Ind. Emp. Sec. Div.*, (1979) 270 Ind. 302, 385 N.E.2d 438, this Court recognized that the exhaustion of administrative remedies is not a prerequisite to obtaining judicial review of a constitutional question. Justice Pivarnik explained:

> "In the present case, the question presented is of constitutional character. With all due respect, we think that the resolution of such a purely legal issue is beyond the expertise of the Division's administrative channels and is thus a subject more appropriate for judicial consideration.
>
> "In sum, we hold that given the constitutional character of the issue presented by Wilson's complaint, it was not necessary for her to press the issue through administrative channels as a precondition to judicial review. We therefore conclude that the trial court had jurisdiction over this matter and erred by dismissing Wilson's complaint." *Id.*, 270 Ind. at 305, 385 N.E.2d at 441.

Our statements in *Wilson* are mirrored in rulings of the United States Supreme Court. *Califano v. Sanders* (1977) 430 U.S. 99, 109, 97 S.Ct. 980, 986, 51 L.Ed.2d 192,

201-2 ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . ."); *Public Utilities Commission v. United States,* (1958) 355 U.S. 534, 539, 78 S.Ct. 446, 450, 2 L.Ed.2d 470, 475 ("That issue is a constitutional one that the Commission can hardly be expected to entertain").

This Court can hardly decry the "scant medical evidence" relative to the constitutional question when the parties no doubt approached the hearing with the understanding that the constitutional question was not at issue before the Industrial Board. It should be noted that our decision in *Wilson* was handed down only eight months prior to the hearing in the instant case. Bunker certainly was entitled to rely on *Wilson* and envision a court challenge to the constitutionality of the statute following the Board's ruling on his claim as necessary to render the constitutional issue ripe for review.

The record reveals that Bunker's claim was predicated solely on the argument that because the asbestos fibers remained *in situ* within his lungs his "exposure" to the asbestos was a continuing one which brought his claim within the statute of limitations. The evidence presented at the hearing was directed toward that contention.

Consequently, the one-half inch thick record before us is void of the development and presentation of facts which, in *Board of Commissioners of Howard Co. v. Kokomo City Plan Comm., supra,* this Court deemed vital to our resolution of constitutional issues. Although the majority finds it appropriate to reach the constitutional question, its analysis reflects a lack of the direction which is provided by a complete presentation of relevant facts in an adversarial posture. The majority focuses its evidentiary analysis primarily on the relationship between the incidence of asbestiosis and the duration and amount

of exposure. That is not at issue here. If a worker is disabled by reason of a job-related exposure to asbestos, he has an exclusive remedy in the recovery of benefits under the Occupational Diseases Act.

The subject matter is the *statute of limitations* which governs the exclusive remedy — assuming disablement occurs. Medical authorities relied on by our Court of Appeals established that very rarely does asbestiosis manifest itself without three years of exposure; rather, the asbestos fibers remain within the lungs and the tissue response, although indolent, is both progressive and irreversible. The Court of Appeals based its conclusion that the statutory period was unconstitutional on this latency period between exposure to asbestos and its adverse physical manifestations and ultimate disablement of the worker. The Court of Appeals reasoned that the statute of limitations was invalid due to the normal latency period:

> "In view of the discovery of this factual information about the disease since the legislature imposed the three-years-from-exposure limitation in 1937, it appears to us that the statute can no longer stand. To impose its ban is to violate the classic constitutional mandate, because to do so amounts to a practical denial of the very right to recovery that the statute was intended to provide.
>
> "We therefore conclude that IC 22-3-7-9(f) is unconstitutional as applied to appellant Bunker and similarly situated workers." *Bunker v. National Gypsum Co., supra,* ___ Ind. App. at ___ , 426 N.E.2d at 425 [footnote omitted].

In other words, within three years after an exposure to asbestos, no manifestation of the disease, let alone disablement, would be present to justify the claim. After

three years, when the manifestations and disablement normally occurs, the statute of limitations would bar the claim. Ultimately, the worker's only hope to exercise his exclusive remedy would lie in continuing the exposure to asbestos until a date within three years of his ultimate disablement. That "Catch-22" predicament for the would-be claimant not only would defy due process and the privileges and immunities guaranteed our citizens—it would be an affront to an Act which is characterized as humanitarian in purpose. *Harbison-Walker Refractories Co. v. Turk*, (1942) 110 Ind. App. 563, 39 N.E.2d 791.

Assuming the Court of Appeals improperly relied on the medical evidence and conclusions contained in the professional journals, it yet remains that the evidence and conclusions and the treatises and journals all exist. Other jurisdictions have relied on these studies, examined the eivdence and conclusions therein, and reached decisions in accord with the Court of Appeals. *See, e.g., Borel v. FibreBoard Paper Products*, 5th Cir. 1973) 493 F.2d 1076; *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, (E.D. Mich. 1978) 451 F. Supp. 1230; *Louisville Trust Co. v. Johns-Manville Products Corp.*, (Ky. 1979) 580 S.W.2d 497, *overruling Columbus Mining Co. v. Walker*, (Ky. 1954) 271 S.W.2d 276; *Harig v. Johns-Manville Products Corp.*, (1978) 284 Md. App. 70, 394 A.2d 299, 1 A.L.R. 4th 105; *df. Urie v. Thompson*, (1949) 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (latent disease silicosis). *See generally*, Note, *The Causation Problem in Asbestos Litigation: Is There an Alternative Theory of Liability?* 15 IND. L. REV. 679 (1982).

Because the constitutional question is an arguable one of such significant import for victims of asbestos exposure, this Court should have exercised the doctrine of

judicial self-restraint instead of broadly declaring the "statute of limitations provision of the Occupational Diseases Act to be constitutional in all respects."[1] *Majority Opinion, supra.* Before us is "scant medical evidence," as the majority characterizes it; that evidence does not concern the constitutional question decided by the majority. Inasmuch as this Court has not considered any medical evidence concerning the latency of asbestiosis, its broad ruling must be regarded as *obiter dictum.* Any other construction of its effect would lead the doctrine of *stare decisis* beyond its bounds.

For all the foregoing reasons, I dissent. Consistent with the doctrine of judicial self-restraint, as embodied in *Board of Commissioners of Howard Co. v. Kokomo City Plan Comm., supra,* this Court should have refused to address the constitutionality of the statute of limitations imposed on asbestos-related claims. If the question must be addressed in the context of this case, Bunker should be provided his right to be heard; consistent with *Wilson v. Review Board of Ind. Emp. Sec. Div., supra,* he should be allowed to seek a trial *de novo* on the constitutionality of the statute, where a development of the facts could occur.

I dissent.

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[1]The majority perhaps feels compelled to reach the question because it was addressed by the Court of Appeals. That motivation is misplaced, however, for pursuant to Ind. R. Ap. P. 11 (B) (3), this Court, in granting transfer, "has jurisdiction of the appeal as originally filed" in the Court of Appeals. We may sustain a judgment on any proper grounds, of course, even if the basis for our decision was not embraced below. *Cain v. State,* (1973) 261 Ind. 41, 300 N.E.2d 89. If it was not appropriate for our Court of Appeals to address the constitutional question, our rules would make little sense if this Court was required to compound that error.

APPENDIX B

[SEAL]

STATE OF INDIANA
Indianapolis, 46204

Clerk of the Supreme Court
and Court of Appeals
Marjorie H. O'Laughlin, Clerk
217 State House
Telephone 232-1930

No. 2-680A179
Richard D. Bunker v. National Gypsum Co.

You are hereby notified that the Court of Appeals has on this day

Appellee petition for Rehearing Denied. Buchanan, C.J.

Appellee petition for Oral Argument Denied. Buchanan, C.J.

Please acknowledge receipt of this notice
in order that our records may show that
you have been notifed of this action.

WITNESS my name and the seal of said
Court, this 30th day of Nov., 1981

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

APPENDIX C

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COURT OF APPEALS OF INDIANA
THIRD DISTRICT

No. 2-680 A 179

[Filed: Sep. 29, 1981]

Richard D. Bunker,
Plaintiff-Appellant

v.

National Gypsum Company,
Defendant-Appellee

APPEAL FROM THE
INDUSTRIAL BOARD OF INDIANA
Cause No. 84488

OPINION

GARRARD, J.

Richard D. Bunker appeals from a decision of the Industrial Board denying disability benefits under the

Occupational Disease Act, IC 22-3-7-1, et seq. The Board rejected his claim on the basis that disablement had occurred within three years of his last exposure to the hazards of the disease.

The statutory basis for the Board's action is IC 22-3-7-9(f),[1] which states,

> "(f) No compensation shall be payable for or on account of any occupational diseases unless disablement, as defined in subsection (e) of this section, occurs within two [2] years after the last day of the last exposure to the hazards of the disease *except in cases of occupational diseases caused by the inhalation of silica dust, coal dust, or asbestos dust and in such cases, within three [3] years after the last day of the last exposure to the hazards of such disease.* However, in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement, as defined in subsection (e) of this section, occurs within two [2] years from the date on which the employee had knowledge of the nature of his occupational disease or, by exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment." (Emphasis added)

Bunker was employed by National Gypsum Company in February 1949. He was exposed to asbestos fibers while supervising a blending process for the manufacture of an acoustical treatment product until November 1950. He was then transferred to other work although he remained in National Gypsum's employ until March 31, 1966.

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[1] This subsection, formerly designated as "(e)," was relettered in 1979.

On July 23, 1976, Bunker underwent exploratory surgery and was diagnosed as suffering from asbestosis. He brought this claim in June 1978.

In an appeal from a companion civil action we held that Bunker's exclusive remedy lay under Indiana's Occupational Disease Act. *Bunker v. National Gypsum Co.* (1980), ___ Ind. App. ___, 406 N.E.2d 1239. We also noted that under the language employed in that act no claim or action accrues to an employee unless and until the occupational disease actually causes disablement or death. 406 N.E.2d at 1241.

In view of these holdings we are now asked to consider the constitutional efficacy of the three year requirement already referred to.

At the outset it is appropriate to observe that due process challenges addressed to statutes of limitations are not a favorite of the law. Their success ratio in appellate courts is meager, and properly so. Despite this, the test to be employed when the question is raised can be clearly and simply stated. The leading Indiana decision is *Wright-Bachman Inc. v. Hodnett* (1956), 235 Ind. 307, 133 N.E.2d 713. Writing for a unanimous court Judge Landis observed,

> "We recognize the general rule that the legislature is the primary judge as to whether the time allowed by a statute of limitations is reasonable. Although the determination of the legislature is reviewable by the courts, the courts will not inquire into the wisdom of the legislative decision in establishing the period of legal bar, unless the time allowed is so short that the statute amounts to a practical denial of the right itself and becomes a denial of justice."

235 Ind. at 323, 133 N.E.2d at 720. *See also Short v. Texaco, Inc.* (1980), ___ Ind. ___. 406 N.E.2d 625;

Toth v. Lenk (1975), 164 Ind. App. 618, 330 N.E.2d 336.

The question then is whether the statutory limitation is such that it must be considered so unjust or unreasonable as to amount to a denial of justice by effecting a denial of the right of recovery which the legislature sought to confer.

The statute before us arguably concerns three purposes of the legislature.

In dealing with a disease rather than the more typical forms of industrial injury the determination of causation may be a problem.[2] The legislature may have desired to insure there was a reasonable nexus between the alleged cause and the resulting harm. This might be especially true since the act otherwise provides that an employee is to be conclusively deemed to have been exposed to the hazards of a disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists. IC 22-3-7-33.

Secondly, the legislature may have been concerned with the traditional attendants of prohibiting stale claims and attempting to assure that material evidence would remain available to the parties in litigation. In this regard, however, it must be observed that the Occupational Disease Act imposes a second limitation period which largely satisfies these purposes. IC 22-3-7-32(c) additionally bars a claim under the act unless the claim is filed within two (2) years after the date of disablement (or death, in the case of claims by dependents).

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[2] *Compare* the Industrial Board's continuing quest for the untoward event in Workmen's Compensation cases. *See, e.g., Calhoun v. Hillenbrand Industries, Inc.* (1978), 269 Ind. 507, 381 N.E.2d 1242 (DeBruler and Hunter, JJ. dissenting).

Thirdly, the statutory scheme contemplates funding disability awards primarily through the use of insurance. *See* IC 22-3-7-33 and 34. Thus, the three year limitation aids the employer and his insurer in the actuarial computation of risks and premiums. This must, however, be considered as a subsidiary goal to the statute's principal purpose of compensating disabled workmen.

The statutory impact is to require an occupational disease claimant to file his claim within three (3) years after his last exposure to the hazards of the disease and within two (2) years after the occurrence of disability. Facially, if the last exposure occurred more than three years from the onset of actual disability, the claimant would be denied recovery because of the decisions holding disability to be a *sine qua non* to a valid claim. *See Durham Mfg. Co. v. Hutchins* (1945), 115 Ind. App. 479, 58 N.E.2d 444; *Hirst v. Chevrolet, Muncie Div. of Gen'l Motors Corp.* (1941), 110 Ind. App. 22, 33 N.E.2d 773; *see also Hibler v. Globe American Corp.* (1958), 128 Ind. App. 156, 147 N.E.2d 19.

We must consider then the nature of the disease, asbestosis, to which the act applies. The disease has been medically recognized for more than fifty years.[3] (For another published account with supporting authorities see Judge Wisdom's opinion for the court in *Borel v. Fibreboard Paper Products Corporation* (5th Cir. 1973), 493 F.2d 1076, 1083-1085, *cert. den.* 419 U.S. 869.) Thus, the initial version of the Indiana act expressly recognized asbestosis and imposed the three-years-from-exposure limitation now denominated IC 22-3-7-9(f). The disease has been characterized as irreversible

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[3] Cooke, *Fibrosis of the Lungs Due to Inhalation of Asbestos Dust*, 2 BRIT. MED. J. 147 (1924).

and monosymptomatic, involving dyspnea, or labored breathing.[4]

Despite this recognition, much remained unknown about the disease and its potential impact on modern urban society until a series of studies were conducted by Dr. Irving Selikoff and others during the 1960's and 1970's.[5]

From these studies two factors critical to our analysis emerge.

First, once inhaled the asbestos fibers remain *in situ* and while the tissue response to them is indolent, it is progressive and apparently irreversible. As Dr. Selikoff characterizes the medical reaction,

> "Thus a workman who has been continually exposed to asbestos for, let us say, twenty-five years carries within him a composite biological effect. The initial burden of inhaled fibers is associated with a twenty-five year effect, those inhaled twenty years before are experiencing a twenty-year effect and so on, the fibers but recently inhaled adding the effect associated with newly deposited material. The clinical resultant is the summation of all these effects.
>
> "This analysis explains the reluctance of many physicians to advise asbestos workers with many years of experience but in good health to leave

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[4] Selikoff, et al., Editorial, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967). A causal relation is also noted between asbestos exposure and mesothelioma, a form of cancer.

[5] Dr. Selikoff served as Professor of Community Medicine at Mount Sinai School of Medicine of the City University of New York and Director of its Environmental Health Sciences Center. In addition to the article cited at n. 4, *see* Selikoff and Hammond, *Asbestos-Associated Disease in United States Shipyards*, 28 CA-A CANCER J. CLIN. 87 (1978), and Selikoff, Churg and Hammond, *The Occurrence of Asbestosis Among Insulation Workers*, 132 ANN. N.Y. ACAD. SCI. 139 (1965).

their employment, since their ultimate fate may be determined *not* by their current exposure but by their exposure many years before."

42 AM. J. MED. 491.

Therefore, occurrence and causation are not dependent upon long continued exposure.

Secondly, and most revealingly, Dr. Selikoff discovered that there is a long period of latency during which the body tissue reacts to the presence of asbestos fibers before the disease can be diagnosed. He reports that a study of more than 1100 asbestosis insulation workers revealed chest x-ray abnormality in only 10% of those whose exposure began less than ten (10) years before the study and in only 44% of those whose exposure began between 10 and 19 years before. Furthermore, the abnormalities noted were minimal. On the other hand, among those exposed for between 20 and 29 years prior to the study, x-rays showed abnormality in 72% of the workmen, and this figure rose to 90% for those with more than thirty (30) years from the onset of exposure.[6]

[6] 42 AM. J. MED. at 488. The following table appeared in 28 CA-A CANCER J. CLIN. at 89:

TABLE 2
X-ray changes in asbestos insulation workers

Order of exposure (yrs.)	No.	% Normal	% Abnormal	Asbestosis (grade)		
				1	2	3
40+	121	5.8	94.2	35	51	28
30-39	194	12.9	87.1	102	49	18
20-29	77	27.2	72.8	35	17	4
10-19	379	55.9	44.1	158	9	0
0-9	346	89.6	10.4	36	0	0
Total	1,117	51.5	48.5	366	126	50

While it was noted that asbestotic fibrosis is a diffuse interstitial variety that may not be readily apparent on a roentgenogram, there appears no doubt of the long reaction time culminating in the presence of the disease.

In view of the discovery of this factual information about the disease since the legislature imposed the three-years-from-exposure limitation in 1937, it appears to us that the statute can no longer stand. To impose its ban is to violate the classic constitutional mandate, because to do so amounts to a practical denial of the very right to recovery that the statute was intended to provide.[7]

We therefore conclude that IC 22-3-7-9(f) is unconstitutional as applied to appellant Bunker and similarly situated workers. The decision of the Industrial Board is reversed and the case is remanded for further proceedings consistent herewith.

Reversed and remanded.

STATON, J. Concurs; HOFFMAN, P.J. Dissents and Files Separate Opinion.

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[7] Nor could it be rationally urged that the legislature intended to divide exposed workers for purposes of coverage into those continually exposed for the necessary 20 to 30 year gestation period and those not. In addition to failing the privileges and immunities test under Art. 1, Sec. 23 of the Indiana Constitution as set forth in *Wright-Bachman, supra*, 235 Ind. at 307, 133 N.E.2d at 719, the act, itself, rebuts any such notion by expressing a conclusive presumption that any exposure is sufficient. IC 22-3-7-33.

COURT OF APPEALS OF INDIANA
THIRD DISTRICT

No. 2-680 A 179

[Filed: Sep. 29, 1981]

Richard D. Bunker,
Plaintiff-Appellant

v.

National Gypsum Company,
Defendant-Appellee

DISSENTING OPINION

HOFFMAN, P.J.

I respectfully dissent.

IC 1971, 22-3-7-9(f) (formerly (e)) (1980 Burns Supp.) clearly states:

"(f) No compensation shall be payable for or on account of any occupational diseases unless disablement, as defined in subsection (e) of this section, occurs within two [2] years after the last day of the last exposure to the hazards of the disease *except in cases of occupational diseases caused by the inhalation of silica dust, coal dust, or asbestos dust and in such cases, within three [3] years after the last day of the last exposure to the hazards of such disease.* However, in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement, as defined in subsection (e) of this section, occurs within [2] years from the date on

> which the employee had knowledge of the nature of his occupational disease or, by exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment." (Emphasis added.)

The law in Indiana is well settled that statutes of limitation are determinations which are within the province of the Legislature. The court cannot overrule that decision made by the Legislature unless the period of time allowed is unreasonable. *Short v. Texaco, Inc.* (1980), ___ Ind. ___, 406 N.E.2d 625. *See also, Wright-Bachman, Inc. v. Hodnett, et al.* (1956), 235 Ind. 307, 133 N.E.2d 713.

The statute of limitation in question is not unreasonable in that it in effect does not deny the right of recovery which the Legislature sought to confer. *Wright-Bachman, supra.* The Legislature was aware of the problems caused by asbestos as evidenced by the inclusion of a specific provision regarding asbestos in the statute it enacted.[1] With this in mind, it added an additional year to the time period for limitation of actions for a certain category of occupational diseases including those caused by inhalation of asbestos dust.

The general purpose of a statute of limitations is to encourage prompt resolution of claims. *Johnson v. St. Vincent Hospital, Inc.* (1980), ___ Ind. ___, 404 N.E.2d 585. Bunker was last exposed to asbestos fibers in November of 1950. Yet his claim was not brought until June of 1978. Clearly in enacting a provision for a 3-year limitation it cannot be seriously argued that the Legislature really meant to cover a period of 28 years.

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[1] As the majority points out on page 5 of their opinion, asbestosis has been medically recognized for more than 50 years.

A statute is presumed to be constitutional and is entitled to every reasonable presumption supporting its validity. *Johnson, supra.* Bunker has not overcome the heavy burden necessary to prove this statute unconstitutional.

IC 1971, 22-3-7-9(f) clearly states the wishes of the Legislature. It is neither unreasonable nor unconstitutional. Therefore, this Court and the Industrial Board have no choice but to defer to those wishes expressed by the Legislature. Any change in the statute is for the Legislature to make.

The decision of the Industrial Board should be affirmed.

APPENDIX D

BEFORE THE FULL INDUSTRIAL BOARD
OF INDIANA

Application No. 84488

RICHARD D. BUNKER,
Plaintiff,

v.

NATIONAL GYPSUM COMPANY,
Defendant

BE IT REMEMBERED, that pursuant to fixing the time and place therefor, the above cause was set for hearing and review by the Full Industrial Board of Indiana, 601 State Office Building, 100 North Senate Avenue, Indianapolis, Indiana, on May 13, 1980, at 9:00 A.M. on Plaintiff's Form No. 16 Application For Review filed on January 10, 1980.

Plaintiff appeared by his counsel, M. Robert Benson; Defendant appeared by its counsel, Edward J. Ohleyer.

The Full Industrial Board, having heard arguments of counsel and being duly advised in the premises, now finds the Single Hearing Member entered his Award dated December 26, 1979, which said Award was in the following words and figures, to-wit:

(H.I.)

It is further found that the Full Industrial Board by the majority of its members adopts the Single Hearing Member's decision.

ORDER

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Full Industrial Board of Indiana

that the Single Hearing Member's decision is hereby affirmed.

Dated this 15th day of May, 1980.

FULL INDUSTRIAL BOARD OF INDIANA

/s/ [Signatures of All Board Members]

ATTEST:

/s/ [Signature]
Secretary

ENL/meg

APPENDIX E

BEFORE THE INDUSTRIAL BOARD OF INDIANA

Application No. 84488

RICHARD D. BUNKER,
Plaintiff,

v.

NATIONAL GYPSUM COMPANY,
Defendant.

BE IT REMEMBERED, that pursuant to notice fixing the time and place therefor, the above cause was set for hearing before EVERETT N. LUCAS, Hearing Member of the Industrial Board of Indiana, on October 2, 1979, at 1:00 P.M., at the County Building, in Anderson, Indiana, on Plaintiff's Form 9 Application filed June 17, 1978.

Plaintiff appeared in person and by counsel, M. ROBERT BENSON. Defendant appeared by its attorney, EDWARD J. OHLEYER.

STIPULATIONS

At the hearing, it was agreed by and between the parties and stipulated as follows:

1. That Plaintiff moves to amend the presentment of the Form 9 Application herein filed, as a form filed under the Occupational Diseases Act. On behalf of the Plaintiff, the Defendant offers no objection to the Single Hearing Judge construing said Form #9 as a claim under the Occupational Diseases Act, and Plaintiff now moves to construe the Form #9 as having been filed under the Occupational Diseases Act. The claim, as of this date of hearing, is to be considered as filed under the Occupational Diseases Act, and there is no claim pending,

at this time, under the Indiana Workmen's Compensation Act.

2. That the Plaintiff was last employed and actually last worked for the Defendant on March 31, 1966.

3. That Plaintiff offers into evidence Plaintiff's Exhibit #1 (in 2 parts) which is a letter of notice to National Gypsum Company from Mr. Bunker's Iowa counsel, to which the Defendant objected as being irrelevant and containing hearsay statements. The Court sustained the objection. Plaintiff's Exhibit #1 is accepted by the Reporter, but is not admitted into evidence.

4. That Plaintiff offers into evidence Plaintiff's Exhibits #2 and #3, to which Defendant objected. The Court admitted into evidence Plaintiff's Exhibits #2 and #3 over Defendant's objection.

5. The Plaintiff offers into evidence Plaintiff's Exhibits #4 and #5, to which Defendant does not object. Plaintiff's Exhibit #4 (in 3 parts), being a letter and supplementary letter from Dr. David G. Kundel, Radiologist, Muscatine General Hospital, Muscatine, Iowa, and Plaintiff's #5, being a letter from Dr. William V. Lorimer, Mount Sinai Medical Center, New York, N.Y.

The Defendant has no objection to Plaintiff's Exhibits #4 and #5, being admitted into evidence, but we do question their relevancy to the issues. However, by agreeing to stipulate these into evidence at this hearing, Defendant is, specifically, not agreeing to stipulate them into evidence, should this matter be heard on the merits, in the event that Defendant's Motion to Dismiss is overruled. The Court now admits Plaintiff's Exhibits #4 (in 3 parts) and #5, and they are admitted subject to stipulation.

ISSUE

The issue to be determined by the Single Hearing Judge is as follows:

(1) whether or not Plaintiff's claim was timely filed.

FINDINGS

The Single Hearing Judge, after having heard the stipulations by the parties of the facts in said cause, all of the evidence adduced, having reviewed the entire record, and being duly advised in the premises therein, now adopts the stipulations as findings, and further finds for the purpose of decision only on Motion to Dismiss:

1. Plaintiff commenced working for the Defendant in February of 1949, as a quality control supervisor supervising the manufacture of a product called thermacoustic which was in the development stage at its Alexandria, Indiana plant. Plaintiff remained in the employment of Defendant until March 31, 1966. The manufacture of theremacoustic involved blending asbestos and other material at Defendant's plant which was inadequately ventilated. From February of 1949 to November of 1950, Plaintifff worked in Defendant's plant under conditions where by reason of inadequate ventilation and no protective masks, he was initially exposed to asbestos dust in large concentrations.

2. On July 23, 1976, Plaintiff underwent surgery at the University of Iowa Hospital where it was learned that he had asbestosis. Dr. Kundel's report indicates a diagnosis of asbestosis on the basis of the medical history, pathological findings at the University of Iowa, and the x-ray changes.

Dr. Kundel's report indicates that Mr. Bunker is continually being exposed to asbestos fibers even at the

present date, as these fibers remain in his lungs and gastrointestinal system. Dr. Lorimer's report states that asbestos in the lungs has a long residence time and, in fact, a portion is present for life. He concluded as of October 18, 1978, that Mr. Bunker was continuously being exposed to asbestos.

Mr. Bunker has not been in the employment of defendant since March 31, 1966. He alleges total disability during the exploratory surgery in July of 1976.

CONCLUSIONS OF FACT AND LAW

While Plaintiff's exposure may be a *continuing one*, that is, continuing as a result of the permanent deposit of asbestos fibers within his body, the Legislature cannot be said to have intended the term "last exposure" to mean other than "last exposure" during and "in the course" of employment.

This limitation permits an employer to set aside funds for self-insurance or to purchase insurance coverage of risks of occupational diseases within the statistical frame of three (3) years after last day of employment. This business cost can be *currently funded* out of reduced profits and/or increased price to the consumer of the product of business. Without a specific reasonable time limitation, the rate making process locks the vital component of predictable losses until some other statistical pattern can be established.

The Legislature has only *excepted* radiation caused disablement where the employee *first learns* of the disablement cause more than three (3) years after last exposure in the couse of employment, if claim is filed within two (2) years from the date knowledge was acquired. This is not a denial of equal protection of the laws by the Board, but a reasonable determination by its present

(sic) body, the Legislature. As general medical knowledge increases and statistical reliability improves, no doubt the Legislature will then enlarge the worker's protection.

Upon the argument of lack of acceptance of the provisions of the Workmen's Occupational Diseases Act by the Defendant prior to 1963: Plaintiff's Exhibit #2, negatively indicates no claims filed, but positively indicates Hartford Accident Company Insurance coverage in 1962. There is no further evidence either way upon which the Plaintiff suggested finding against Defendant; that Defendant failed to accept the provisions of the Workmen's Compensation or Occupational Diseases Act.

The Single Hearing Judge, on behalf of the Board, declines to enter any such finding without hearing evidence material and relevant to that specific issue. Further, if Plaintiff has positive evidence and the same be alleged in pursuit of the civil remedy, the Single Hearing Judge finds no case suggesting a condition precedent to the civil remedy being filed that the *Board* must make a negative finding on acceptance. Surely, the Civil Court also has jurisdiction to do so, and the Defendant would there have notice of such claim being made and an opportunity to defend.

AWARD

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Industrial Board of Indiana, that the Industrial Board of Indiana is without jurisdiction to consider the within Form #9 Application amended and tendered now by joint stipulation, as a claim under the Workmen's Occupational Diseases Act, and that the said claim should be and now is dismissed.

Costs, if any, are assessed against the Plaintiff.

Dated this 26th day of December, 1979.

INDUSTRIAL BOARD OF INDIANA

/s/ Everett N. Lucas
Hearing Member

ATTEST:

/s/ [Signature]
Executive Secretary of the Board

APPENDIX F

RICHARD D. BUNKER,
Plaintiff-Appellant,

v.

NATIONAL GYPSUM CO.,
Defendant-Appellee.

No. 3-779A193.

Court of Appeals of Indiana,
Third District.

July 15, 1980.

Ronald L. Sowers, M. Robert Benson, Sowers & Benson, Fort Wayne, for plaintiff-appellant.

Jim A. O'Neal, James L. Petersen, Ice, Miller, Donadio & Ryan, Indianapolis, for defendant-appellee.

GARRARD, Presiding Judge.

Appellant Richard D. Bunker was an employee of appellee National Gypsum Company from 1949 to 1966. National Gypsum manufactures items containing asbestos fibers. Bunker, from February 1949 to November 1950, was required to work in an area of intense and continuous exposure to asbestos dust and as a result thereof, Bunker has developed a disabling lung disease, asbestosis. He brought this civil action against National Gypsum alleging gross negligence in the failure to provide safe working conditions.

The complaint was dismissed for failure to state a claim upon which relief could be granted on the basis that Bunker's rights and remedies are governed exclusively by the provisions of the Indiana Occupational Disease Act, IC 1971, 22-3-7-1 et seq. (Burns Code Ed.).

Judgment was subsequently entered in favor of National Gypsum.

The issue before this court[1] is which version of the act is applicable; the act as it existed in 1950, the time of Bunker's last exposure to asbestos dust, or the act as it existed at the time of his disablement.

If the 1950 version of the act is applied, the act would not be Bunker's exclusive remedy because the act at that time provided that it was only applicable to those who had affirmatively accepted it. There was no evidence presented that National Gypsum had accepted the act.

The 1963 amendment provided that an employee is required to accept compensation for disablement by occupational disease arising out of and in the course of his employment unless he has exempted himself from the provisions of the act.[2] Unless the employee has ex-

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[1]Bunker also challenges the constitutionality of IC 22-3-7-9, the statute of limitations provision of the act, on the grounds that it denies him equal protection of the law. We decline to reach this issue as it is not properly before this court. The trial court found that Bunker's exclusive remedy was provided by the act. It did not hold that he had no right to recovery under the act because his claim was barred by IC 22-3-7-9. It is not necessary to consider the constitutionality of this provision in order to determine the merits of the action; therefore, we will not do so. *See* 5 *I.L.E. Constitutional Law* §34.

[2]IC 22-3-7-2 reads in pertinent part as follows:

"From and after the first day of April, 1963, every employer and every employee, except as herein stated, shall be presumed to have accepted the provisions of this act [22-3-7-1 – 22-3-7-38], respectively, to pay and accept compensation for disablement or death by occupational disease arising out of and in the course of the employment, and shall be bound thereby, unless he is hereby authorized so to do and shall have given prior to any disablement or death from occupational disease, notice to the contrary in the manner herein provided. . . ."

empted himself from the act, it provides the exclusive rights and remedies on account of disablement or death by occupational disease. IC 22-3-7-6.[3]

The act has at all times granted compensation on account of *disablement* or *death*. The mere exposure or contraction of an occupational disease does not entitle the employee to compensation. *Durham Mfg. Co. v. Hutchins* (1945), 115 Ind.App. 479, 58 N.E.2d 444; *Hirst v. Chevrolet, Muncie Div. of General Motors Corp.* (1941), 110 Ind.App. 22, 33 N.E.2d 773. No employee has a remedy under the act unless or until the occupational disease causes death or disablement.

In *Hibler v. Globe American Corporation* (1958), 128 Ind.App. 156, 147 N.E.2d 19, it was held that a cause of action under the act accrues and becomes vested at the time of disablement and/or death. The terms and conditions supplied by the Act in existence at that time are the terms and conditions which control and which the employee would be required to rely upon.

In *Hirst v. Chevolet, Muncie Div. of General Motors Corp.* (1941), 110 Ind.App. 22, 27, 33, N.E.2d 773, 775, the court considered the argument that since the employee had contracted the occupational disease prior to the effective date of the act, her claim was not covered:

"The appellee also contends that the appellant in this cause does not come within the purview of

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[3] IC 22-3-7-6:

"The rights and remedies herein granted to an employee subject to this act [22-3-7-1 – 22-3-7-38] on account of disablement or death by occupational disease arising out of and in the course of the employment shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such disablement or death."

the Workmen's Occupational Disease Act (Acts 1937, ch. 69, p. 334), and that the Industrial Board has no jurisdiction thereof because the disease from which appellant is suffering was contracted prior to the effective date of the act.

* * *

"The act provides for compensation for disabilities from occupational diseases and not for contracting such diseases. The term 'disablement' is defined in the act as follows: "The term 'disablement' means the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation, or equal wages in other suitable employment and 'disability' means the state of being so incapacitated.' Subsection (d) of Section 5.

"'There is a difference between having a disease and being disabled thereby.' *Central Pattern & Foundry Co. v. Industrial Commission et al.*, 374 Ill. 300, 29 N.E.2d 511, 514. Since the act provides for compensation for disablement and since the appellant did not become disabled within the meaning of the act until almost a year after, the effective date thereof, he clearly comes within the purview of the act and the Industrial Board has jurisdiction of this cause."

Thus, the provisions of the act as they existed in 1950, the date of Bunker's last exposure to the asbestos, are not applicable.

Inasmuch as Bunker became disabled after the effective date of the 1963 amendment, he is bound by the provisions thereof. Since neither he nor National Gypsum has

exempted themselves from the provisions of the act, the act is Bunker's exclusive remedy and an action at law for negligence against National Gypsum will not lie.

The trial court did not err in dismissing the complaint for failure to state a claim for which relief could be granted.

Affirmed.

HOFFMAN and STATON, JJ., concur.

APPENDIX G

[Filed DEC 27 1982]

No.

IN THE SUPREME COURT OF THE STATE OF INDIANA

October Term, 1982

RICHARD D. BUNKER,
Appellant,

v.

NATIONAL GYPSUM COMPANY,
Appellee.

On appeal from the Indiana Supreme Court, No. 1082 S 403, Court of Appeals No. 2-680 A 179, Full Industrial Board No. 84488

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard D. Bunker, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order affirming the Award of the Industrial Board of Indiana, entered herein on October 26, 1982.

This appeal is taken pursuant to 28 U.S.C., Section 1257(2). The provisions of 28 U.S.C., Section 2403(b) may be applicable.

SOWERS & BENSON
Attorneys for Appellant

By: /s/ M. Robert Benson

M. Robert Benson

One Rose Marie's Alley
"The Landing"
Fort Wayne, IN 46802
219/424-7077

APPENDIX H

OCCUPATIONAL DISEASE ACT

PREAMBLE

"An Act concerning the general welfare of the people of the state, providing remedies for injuries suffered or death resulting from occupational disease incurred in the course of employment and providing for enforcement and administration thereof." Preamble, Acts of Indiana General Assembly, 1937, C. 69.

* * *

CHAPTER 7. OCCUPATIONAL DISEASE ACT

22-3-7-1 Citation of act

Sec. 1. This act shall be known and may be cited as "The Indiana Workmen's Occupational Diseases Act." (*Formerly: Acts 1937, c.69, s.1*).

22-3-7-2 Acceptance of provisions; police and firemen; coverage

Sec. 2. From and after the first day of April, 1963, every employer and every employee, except as herein stated, shall be required to comply with the provisions of this chapter, respectively to pay and accept compensation for disablement or death by occupational disease arising out of and in the course of the employment, and shall be bound thereby. This chapter shall not apply to employees of municipal corporations in this state who are members of the fire department or police department of any such municipality and who are also members of a firemen's pension fund or of a policemen's pension fund: Provided, however, That if the common council elects

to purchase and procure workmen's occupational disease insurance to insure said employees with respect to medical benefits under the provisions of this chapter, the medical provisions shall apply to members of the fire department or police department of any such municipal corporation who are also members of a firemen's pension fund or of a policemen's pension fund: Provided further, That in any instance when any municipal corporation has heretofore purchased or procured, or hereafter purchases or procures, workmen's occupational disease insurance covering members of the fire department or police department who are also members of a firemen's pension fund or a policemen's pension fund, and has paid or hereafter pays the premium or premiums for such insurance, the payment of such premiums is hereby declared to be a legal and allowable expenditure of funds of any municipal corporation: Provided further, That in any case where the common council has procured workmen's occupational disease insurance as herein provided, any member of such fire department or police department employed in the city, carrying such workmen's occupational disease insurance as herein provided, shall be limited to recovery of medical and surgical care, medicines, laboratory, curative and palliative agents and means, X-ray, diagnostic and therapeutic services to the extent that such services are provided for in the workmen's occupational disease policy so procured by such city, and shall not also recover in addition thereto for such same benefits as are provided in IC 1971, 19-1-13.

Nothing contained in this amendatory section shall be construed to affect the rights and liabilities of employees and employers had by them prior to April 1, 1963 under the provisions of the Indiana Workmen's Occupational Diseases Act of 1937 and amendments

thereto. (*Formerly: Acts 1937, c.69, s.2; Acts 1963, c.388, s.1; Acts 1974, P.L.109, SEC.1*).

* * *

22-3-7-6 Exclusive remedies

Sec. 6. The rights and remedies herein granted to an employee subject to this act on account of disablement or death by occupational disease arising out of and in the course of the employment shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such disablement or death. (*Formerly: Acts 1937, c.69, s.4c; Acts 1963, c.388, s.6*).

22-3-7-7 Statutory duties; application of law

Sec. 7. Nothing in this act shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty. (*Formerly: Acts 1937, c.69, s.4d; Acts 1963, c.388, s.7*).

22-3-7-8 Place of exposure; foreign states or foreign countries

Sec. 8. Every employer and employee under this act shall be bound by the provisions hereof whether exposure and disablement therefrom, or death resulting from an occupational disease occurs within the state or in some other state or in a foreign country. (*Formerly: Acts 1937, c.69, s.4e; Acts 1963, c.388, s.8*).

22-3-7-9 Definitions; application of chapter; exemptions

Sec. 9. As used in this chapter:

(a) "Employer" shall include the state and any political division, any municipal corporation within the state,

any individual, firm, association or corporation or the receiver or trustee of the same, or the legal representatives of a deceased person, using the services of another for pay. If the employer is insured it shall include his insurer so far as applicable.

(b) The term "employee," means every person, including a minor, in the service of another, under any contract of hire or apprenticeship written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer. A "minor" shall mean an individual under the age of seventeen (17) years. Except as herein otherwise provided, all such minor employees are hereby made of full age for all purposes, under, in connection with or arising out of this chapter. Any reference to an employee who has suffered disablement shall, when the employee is dead, also include his legal representative, dependents and other persons to whom compensation may be payable. Except as hereinafter otherwise provided, if the employee be a minor who, at the time of the last exposure, is employed, required, suffered or permitted to work in violation of any of the provisions of any of the child labor laws of this state, the amount of compensation and death benefits, as provided in this chapter, shall be double the amount which would otherwise be recoverable. The insurance carrier shall be liable on its policy for one half (½) of the compensation or benefits that may be payable on account of the disability or death of such minor, and the employer shall be wholly liable for the other one half (½) of such compensation or benefits. If such employee be a minor who is not less than sixteen (16) years and not more than seventeen (17) years of age, and who at the time of the last exposure is employed, suffered or permitted to work at any occupation which is not

prohibited by law, the provisions of this chapter prescribing double the amount otherwise recoverable shall not apply. The rights and remedies herein granted to a minor subject to this chapter on account of disease shall exclude all rights and remedies of such minor, his parents, his personal representatives, dependents, or next of kin at common law, statutory or otherwise, on account of any disease.

(c) This chapter shall not apply to casual laborers as defined in subsection (b) of this section, nor to farm or agricultural employees, nor to domestic servants, nor to railroad employees engaged in train service as engineers, firemen, conductors, brakemen, flagmen, baggagemen, or foremen in charge of yard engines and helpers assigned thereto, nor to their employers with respect to such employees: neither shall this chapter apply to employees or their employers with respect to employments in which the laws of the United States provide for compensation or liability for injury to the health, disability or death by reason of diseases suffered by such employees.

(d) The term "disablement" means the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation, or equal wages in other suitable employment and "disability" means the state of being so incapacitated.

(e) No compensation shall be payable for or on account of any occupational diseases unless disablement, as herein defined, occurs within two (2) years after the last day of the last exposure to the hazards of the disease except in cases of occupational diseases caused by the inhalation of silica dust, coal dust, or asbestos dust and in such cases, within three (3) years after the last day

of the last exposure to the hazards of such disease: Provided, That in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement, as herein defined, occurs within two (2) years from the date on which the employee had knowledge of the nature of his occupational disease or, by exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment.

(f) No compensation shall be payable for or on account of death resulting from any occupational disease unless death occurs within two (2) years after the date of disablement: Provided, That this paragraph shall not be a bar to compensation for death (a) where death occurs during the pendency of a claim filed by an employee within two (2) years after the date of disablement and which claim has not resulted in a decision or has resulted in a decision which is in process of review or appeal, or (b) where, by agreement filed or decision rendered a compensable period of disability has been fixed and death occurs within two (2) years after the end of such fixed period, but in no event later than three hundred (300) weeks after the date of disablement. (*Formerly: Acts 1937, c.69, s.5; Acts 1955, c.131, s.1; Acts 1955, c.195, s.1; Acts 1961, c.240, s.1; Acts 1963, c.48, s.16; Acts 1969, c.101, s.1; Acts 1974, P.L.109, SEC. 3*).

22-3-7-10 Definitions; course of employment

Sec. 10. (a) As used in this act, the term "occupational disease" means a disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where

such diseases follow as an incident of an occupational disease as defined in this section.

(b) A disease shall be deemed to arise out of the employment, only if there is apparent to the rational mind, upon consideration of all of the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. (*Formerly: Acts 1937, c. 69, s. 6*).

* * *

22-3-7-16 Awards; waiting period; amputations; loss of use of appendages; blindness; deafness; disfigurement; death benefits; payment to guardian or trustee

Sec. 16. (a) Compensation shall be allowed on account of disablement from occupational disease resulting in only temporary total disability to work or temporary partial disability to work beginning with the eighth day of such disability except for the medical benefits provided for in IC 22-3-7-17. Compensation shall be allowed for the first seven calendar days only if the disability continues for longer than twenty-eight days.

(b) For disablements occuring on and after April 1, 1951 and prior to July 1, 1971, from occupational disease resulting in temporary total disability for any work there shall be paid to the disabled employee during such temporary total disability a weekly compensation equal to sixty (60) per cent of his average weekly wages for a period not to exceed five hundred weeks. Compensation shall be allowed for the first seven calendar days only if the disability continues for longer than twenty-eight days.

For disablements occurring on and after July 1, 1971, and prior to July 1, 1974, from occupational disease resulting in temporary total disability for any work there shall be paid to the disabled employee during such temporary total disability a weekly compensation equal to sixty (60) per cent of his average weekly wages, as defined in IC 22-3-7-19 for a period not to exceed five hundred weeks. Compensation shall be allowed for the first seven calendar days only if the disability continues for longer than twenty-eight days.

For disablements occurring on and after July 1, 1974, and before July 1, 1976, from occupational disease resulting in temporary total disability for any work there shall be paid to the disabled employee during such temporary total disability a weekly compensation equal to sixty-six and two-thirds ($66^2/_3$) per cent of his average weekly wages, up to one hundred thirty-five dollars ($135.00) average weekly wages, as defined in section 19 of this chapter, for a period not to exceed five hundred (500) weeks. Compensation shall be allowed for the first seven calendar days only if the disability continues for longer than twenty-one days.

For disablements occurring on and after July 1, 1976, from occupational disease resulting in temporary total

disability for any work there shall be paid to the disabled employee during the temporary total disability weekly compensation equal to sixty-six and two-thirds per cent ($66^2/_3\%$) of his average weekly wages, as defined in IC 22-3-7-19, for a period not to exceed five hundred (500) weeks. Compensation shall be allowed for the first seven (7) calendar days only if the disability continues for longer than twenty-one (21) days.

(c) For disablements, occurring on and after April 1, 1951 and prior to July 1, 1971, from occupational disease resulting in temporary partial disability for work, there shall be paid to the disabled employee during such disability, a weekly compensation equal to sixty (60) per cent of the difference between his average weekly wages and the weekly wages at which he is actually employed after the disablement, for a period not to exceed three hundred weeks. Compensation shall be allowed for the first seven calendar days only if the disability continues for longer than twenty-eight days. In case of partial disability after the period of temporary total disability, the latter period shall be included as part of the maximum period allowed for partial disability.

For disablements occurring on and after July 1, 1971, and prior to July 1, 1974, from occupational disease resulting in temporary partial disability for work, there shall be paid to the disabled employee during such disability a weekly compensation equal to sixty (60) per cent of the difference between his average weekly wages, as defined in, IC 22-3-7-19 and the weekly wages at which he is actually employed after the disablement, for a period not to exceed three hundred weeks. Compensation shall be allowed for the first seven calendar days only if the disability continues for longer than twenty-eight days. In case of partial disability after the period of temporary total disability, the latter period shall be

included as a part of the maximum period allowed for partial disability.

For disablements occuring on and after July 1, 1974, from occupational disease resulting in temporary partial disability for work, there shall be paid to the disabled employee during such disability a weekly compensation equal to sixty-six and two-thirds ($66^2/_3$) per cent of the difference between his average weekly wages, as defined in section 19(a) of this chapter, and the weekly wages at which he is actually employed after the disablement, for a period not to exceed three hundred (300) weeks. Compensation shall be allowed for the first seven (7) calendar days only if the disability continues for longer than twenty-one (21) days. In case of partial disability after the period of temporary total disability, the latter period shall be included as a part of the maximum period allowed for partial disability.

(d) For disabilities, occurring on and after April 1, 1951, and prior to April 1, 1955, from occupational disease in the following schedule, the employee shall receive in lieu of all other compensation, on account of such disabilities, a weekly compensation of sixty (60) per cent of his average weekly wage; for disabilities occurring on and after April 1, 1955 and prior to July 1, 1971, from occupational disease in the following schedule, the employee shall receive in addition to disability benefits not exceeding twenty-six (26) weeks on account of said occupational disease, a weekly compensation of sixty (60) per cent of his average weekly wages.

For disabilities occurring on and after July 1, 1971, from occupational disease in the following schedule, the employee shall receive in addition to disability benefits not exceeding twenty-six (26) weeks on account of said

occupational disease, a weekly compensation of sixty (60) per cent of his average weekly wages not to exceed one hundred dollars average weekly wages, for the period stated for such disabilities respectively, to-wit:

(1) Amputations: For the loss by separation, of the thumb, sixty weeks; of the index finger, forty weeks; of the second finger, thirty-five weeks; of the third or ring finger, thirty weeks; of the fourth or little finger, twenty weeks; of the hand by separation below the elbow, two hundred weeks; of the arm above the elbow joint, two hundred fifty weeks; of the big toe, sixty weeks; of the second toe, thirty weeks; of the third toe, twenty weeks; of the fourth toe, fifteen weeks; of the fifth or little toe, ten weeks; of the foot below the knee joint, one hundred fifty weeks; and of the leg above the knee joint, two hundred weeks. The loss of more than one phalange of a thumb or toe shall be considered as the loss of the entire thumb or toe. The loss of more than two phalanges of a finger shall be considered as the loss of the entire finger. The loss of not more than one phalange of a thumb or toe shall be considered as the loss of one-half of the thumb or toe and compensation shall be paid for one-half of the period for the loss of the entire thumb or toe. The loss of not more than two phalanges of a finger shall be considered as the loss of one-half the finger and compensation shall be paid for one-half of the period for the loss of the entire finger.

(2) Loss of Use: The total permanent loss of the use of an arm, hand, thumb, finger, leg, foot, toe, or phalange shall be considered as the equivalent of the loss by separation of the arm, hand, thumb, finger, leg, foot, toe or phalange and the compensation shall be paid for the same period as for the loss thereof by separation.

(3) Partial Loss of Use: For the permanent partial loss of the use of an arm, hand, thumb, finger, leg, foot, toe or phalange, compensation shall be paid for the proportionate loss of the use of such arm, hand, thumb, finger, leg, foot, toe or phalange.

(4) For disablements for occupational disease resulting in total permanent disability, five hundred weeks.

(5) For the loss of both hands, or both feet, or the total sight of both eyes, or any two of such losses resulting from the same disablement by occupational disease, five hundred weeks.

(6) For the permanent and complete loss of vision by enucleation of an eye or its reduction to one-tenth of normal vision with glasses, one hundred and fifty weeks, and for any other permanent reduction of the sight of an eye, compensation shall be paid for a period proportionate to the degree of such permanent reduction without correction or glasses. However, when such permanent reduction without correction or glasses would result in one hundred per cent loss of vision, but correction or glasses would result in restoration of vision, then compensation shall be paid for fifty per cent of such total loss of vision without glasses plus an additional amount equal to the proportionate amount of such reduction with glasses, not to exceed an additional fifty per cent.

(7) For the permanent and complete loss of hearing, two hundred weeks.

(8) In all other cases of permanent partial impairment, compensation proportionate to the degree of such permanent partial impairment, in the discretion of the Industrial Board, not exceeding five hundred weeks.

(9) In all cases of permanent disfigurement, which may impair the future usefulness or opportunities of the employee, compensation in the discretion of the Industrial Board, not exceeding two hundred weeks, except that no compensation shall be payable under this paragraph where compensation shall be payable under paragraphs (1) to (8), inclusive, of subsection (d) of this section. Where compensation for temporary total disability has been paid, this amount of compensation shall be deducted from any compensation due for permanent disfigurement.

(e) If any employee, only partially disabled, refuses employment suitable to his capacity procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal unless, in the opinion of the Industrial Board, such refusal was justifiable.

(f) If an employee has sustained a permanent impairment or disability from an accidental injury other than an occupational disease in another employment than that in which he suffered a subsequent disability from an occupational disease, such as herein specified, he shall be entitled to compensation for the subsequent disability in the same amount as if the previous impairment or disability had not occurred: Provided, That if the permanent impairment or disability resulting from an occupational disease for which compensation is claimed results only in the aggravation or increase of a previously sustained permanent impairment from an occupational disease or physical condition regardless of the source or cause of such previously sustained impairment from an occupational disease or physical condition, the board shall determine the extent of the previously sustained permanent impairment from an occupational disease or

physical condition as well as the extent of the aggravation or increase resulting from the subsequent permanent impairment or disability, and shall award compensation only for that part of said occupational disease or physical condition resulting from the subsequent permanent impairment: Provided further, That amputation of any part of the body or loss of any or all of the vision of one or both eyes caused by an occupational disease shall be considered as a permanent impairment or physical condition.

(g) If an employee suffers a disablement from occupational disease for which compensation is payable while he is still receiving or entitled to compensation for a previous injury by accident or disability by occupational disease in the same employment, he shall not at the same time be entitled to compensation for both, unless it be for a permanent injury, such as specified in paragraphs (1), (2), (3), (6) or (7) of subsection (d) of this section; but he shall be entitled to compensation for that disability and from the time of that disability which will cover the longest period and the largest amount payable under this chapter.

(h) If an employee receives a permanent disability from occupational disease such as specified in paragraphs (1), (2), (3), (6) or (7) of subsection (d) of this section, after having sustained another such permanent disability in the same employment he shall be entitled to compensation for both such disabilities, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation and, when such previous and subsequent permanent disabilities, in combination result in total permanent disability or permanent total impairment, compensation shall be payable for such permanent total disability or

impairment, but payments made for the previous disability or impairment shall be deducted from the total payment of compensation due.

(i) When an employee has been awarded or is entitled to an award of compensation for a definite period under this chapter for disability from occupational disease, which disablement occurs on and after April 1, 1951, and prior to April 1, 1963, and such employee dies from any other cause than such occupational disease, payment of the unpaid balance of such compensation, not exceeding three hundred weeks, shall be made to his dependents of the second and third class as defined in IC 22-3-7, sections 11 through 14, and compensation, not exceeding five hundred weeks, shall be made to his dependents of the first class as defined in IC 22-3-7, sections 11 through 14.

When an employee has been awarded or is entitled to an award of compensation for a definite period from an occupational disease wherein disablement occurs on and after April 1, 1963, and such employee dies from other causes than such occupational disease, payment of the unpaid balance of such compensation not exceeding three hundred and fifty weeks shall be paid to his dependents of the second and third class as defined in IC 22-3-7, sections 11 through 14 and compensation, not exceeding five hundred weeks shall be made to his dependents of the first class as defined in IC 22-3-7, sections 11 through 14.

(j) Any payment made by the employer to the employee during the period of his disability, or to his dependents, which, by the terms of this chapter, was not due and payable when made, may, subject to the approval of the Industrial Board, be deducted from the amount to be paid as compensation, but such deduction

shall be made from the distal end of the period during which compensation must be paid, except in cases of temporary disability.

(k) When so provided in the compensation agreement or in the award of the Industrial Board, compensation may be paid semi-monthly, or monthly, instead of weekly.

(*l*) When the aggregate payments of compensation awarded by agreement or upon hearing to an employee or dependent under eighteen years of age, do not exceed one hundred dollars, the payment thereof may be made directly to such employee or dependent, except when the Industrial Board shall order otherwise.

Whenever the aggregate payments of compensation, due to any person under eighteen years of age, exceed one hundred dollars, the payment thereof shall be made to a trustee, appointed by the circuit or superior court, or to a duly qualified guardian, or, upon the order of the Industrial Board, to a parent or to such minor person. The payment of compensation, due to any person eighteen years of age or over, may be made directly to such person.

(m) If an employee, or a dependent, is mentally incompetent, or a minor at the time when any right or privilege accrues to him under this chapter, his guardian or trustee may, in his behalf, claim and exercise such right and privilege.

(n) All compensation payments named and provided for in this section, shall mean and be defined to be for only such occupational diseases and disabilities therefrom as are proved by competent evidence, of which there are or have been objective conditions or symptoms proven, not within the physical or mental control of the em-

ployee himself. (*Formerly: Acts 1937, c.69, s.8; Acts 1949, c.242, s.1; Acts 1951, c.250, s.1; Acts 1955, c.326, s.1; Acts 1963, c.388, s.11; Acts 1971, P.L.354, SEC.2; Acts 1974, P.L.109, SEC.5*). *As amended by Acts 1976, P.L.112, SEC.5.*

22-3-7-17 Medical attendance and treatment; prosthetic devices; emergency treatment

Sec. 17. During the period of disablement, the employer shall furnish or cause to be furnished, free of charge to the employee, an attending physician for the treatment of his occupational disease; and in addition thereto such surgical, hospital and nursing services and supplies as the attending physician or the Industrial Board may deem necessary. If the employee is requested or required by the employer to submit to treatment outside the county of employment, said employer shall also pay the reasonable expense of travel, food and lodging necessary during the travel, but not to exceed the amount paid at the time of said travel by the state of Indiana to its employees.

During the period of disablement resulting from the occupational disease, the employer shall furnish such physician, services and supplies, and the Industrial Board may, on proper application of either party, require that treatment by such physician and such services and supplies be furnished by or on behalf of the employer as the Industrial Board may deem reasonably necessary. After an employee's occupational disease has been adjudicated by agreement or award on the basis of permanent partial impairment and within the statutory period for review in such case as provided in section 20(i) of this act, the employer may continue to furnish a physician or a surgeon and other medical services and supplies, and

the Industrial Board may, within such statutory period for review as provided in section 20(i) of this act, on a proper application of either party, require that treatment by such physician or surgeon, and such services and supplies be furnished by and on behalf of the employer as the Industrial Board may deem necessary to limit or reduce the amount and extent of such impairment. The refusal of the employee to accept such services and supplies when so provided by or on behalf of the employer shall bar the employee from all compensation otherwise payable during the period of such refusal and his right to prosecute any proceeding under this act shall be suspended and abated until such refusal ceases; no compensation for permanent total impairment, permanent disfigurement or death shall be paid or payable for that part or portion of such impairment, disfigurement or death which is the result of the failure of such employee to accept such treatment, services and supplies: Provided, That an employer may at any time permit an employee to have treatment for his disease or injury by spiritual means or prayer in lieu of such physician, services and supplies.

Where a compensable occupational disease results in the amputation of an arm, hand, leg or foot or the enucleation of an eye or the loss of natural teeth, the employer shall furnish an artificial member and, where required, proper braces.

If an emergency or because of the employer's failure to provide such attending physician or such surgical, hospital or nurse's services and supplies or such treatment by spiritual means or prayer as herein specified, or for other good reason, a physician other than that provided by the employer treats the diseased employee within the period of disability, or necessary and proper surgical,

hospital or nurse's services and supplies are procured within said period, the reasonable cost of such services and supplies shall, subject to approval of the Industrial Board, be paid by the employer. (*Formerly: Acts 1937, c.69, s.9; Acts 1947, c.164, s.6; Acts 1963, c.388, s.12*).

* * *

22-3-7-21 Awards; disqualification

Sec. 21. (a) No compensation shall be payable under the provisions of this act for any condition of physicai or mental ill-being, disability, disablement, or death for which compensation is recoverable on account of accidental injury under "The Indiana Workmen's Compensation Act of 1929" and amendments thereto.

(b) No compensation shall be allowed for any disease or death intentionally self-inflicted by the employee, or due to his intoxication, his commission of a felony or misdemeanor, his willful failure or refusal to use a safety appliance, his willful failure or refusal to obey a reasonable written or printed rule of the employer which has been posted in a conspicuous position in the place of work, or his willful failure or refusal to perform any statutory duty. The burden of proof shall be on the defendant. (*Formerly: Acts 1937, c.69, s.14*).

* * *

22-3-7-23 Jurisdiction; administration

Sec. 23. The Industrial Board shall have jurisdiction over the operation and administration of the compensation provisions of this act, and the Board shall perform all of the duties imposed upon it by the provisions of this act, and such further duties as may hereafter be

imposed by law and the rules of the Industrial Board not inconsistent therewith. (*Formerly: Acts 1937, c.69, s.16*).

* * *

22-3-7-26 Disputes; settlement

Sec. 26. All disputes arising under this act, except section three hereof, if not settled by the agreement of the parties interested therein, with the approval of the Board, shall be determined by the Board. (*Formerly: Acts 1937, c.69, s.19*).

22-3-7-27 Awards; modification; hearings; appeals; investigations

Sec. 27. (a) If the employer and the employee or his dependents disagree in regard to the compensation payable under this act, or, if they have reached such an agreement, which has been signed by them, filed with and approved by the Industrial Board, and afterward disagree as to the continuance of payments under such agreement, or as to the period for which payments shall be made, or as to the amount to be paid, because of a change in conditions since the making of such agreement, either party may then make an application, to the Industrial Board, for the determination of the matters in dispute, when compensation which is payable in accordance with an award or by agreement approved by the Industrial Board, is ordered paid in a lump sum by the Board, no review shall be had as in this paragraph mentioned.

(b) The application making claim for compensation filed with the Industrial Board shall state:

(1) The approximate date of the last day of the last exposure and the approximate date of the disablement.

(2) The general nature and character of the illness or disease claimed.

(3) The name and address of the employer by whom employed on the last day of the last exposure, and if employed by any other employer after such last exposure and before disablement the name and address of such other employer or employers.

(4) In case of death, the date and place of death.

(5) Amendments to applications making claim for compensation which relate to the same disablement or disablement resulting in death originally claimed upon may be allowed by the Industrial Board in its discretion, and, in the exercise of such discretion, it may, in proper cases, order a trial de novo; such amendment shall relate back to the date of the filing of the original application so amended.

(c) Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of hearing. The hearing of all claims for compensation, on account of occupational disease, shall be held in the county in which the last exposure occurred, except when the parties consent to a hearing elsewhere: Provided, That in disputes wherein the employer denies liability or refuses, fails or neglects to pay compensation during the period of employee's temporary total disablement, such hearing may, upon written request by the disabled or injured employee, be set in the county in which the last exposure occurred or any adjoining county thereto, wherein cases are to be set for hearing prior to the date of hearings in the county of last exposure.

(d) The Board by any or all of its members shall hear the parties at issue, their representatives and witnesses,

and shall determine the dispute in a summary manner. The award shall be filed with the record of proceedings, and a copy thereof shall immediately be sent by registered mail to each of the parties in dispute.

(e) If an application for review is made to the Board within twenty (20) days after receiving a copy of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue, their representatives and witnesses as soon as practicable, and shall make an award and file the same with the finding of the facts on which it is based and send a copy thereof to each of the parties in dispute, in like manner as specified in the last foregoing section.

(f) An award of the Board, by less than all of the members as provided in this section, if not reviewed as provided in this section, shall be final and conclusive.

An award by the full Board shall be conclusive and binding unless either party to the dispute, within thirty (30) days after receiving a copy of such award, appeals to the Appellate Court under the same terms and conditions as govern appeals in ordinary civil actions, and the Appellate Court shall have jurisdiction to review all questions of law and of fact.

The Board, of its own motion, may certify questions of law to the Appellate Court for its decision and determination.

An assignment of errors that the award of the full Board is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts.

All such appeals and certified questions of law shall be submitted upon the date filed in the Appellate Court, shall be advanced upon the docket of the court, and shall be determined at the earliest practicable date, without any extensions of time for filing briefs.

An award of the full Board affirmed on appeal, by the employer, shall be increased thereby five per cent (5%), and by order of the court may be increased ten per cent (10%).

(g) Upon order of the Industrial Board made after five (5) days' notice is given to the opposite party, any party in interest may file in the circuit or superior court of the county in which the disablement occurred, a certified copy of the memorandum of agreement, approved by the Board, or of an order or decision of the Board, or of an award of the full Board unappealed from, or of an award of the full Board affirmed upon an appeal, whereupon the court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though such judgment has been rendered in a suit duly heard and determined by the court.

Any such judgment of such circuit or superior court, unappealed from or affirmed on appeal or modified in obedience to the mandate of the Appellate Court, shall be modified to conform to any decision of the Industrial Board, ending, diminishing or increasing any weekly payment under the provisions of subsection (i) of this section, upon the presentation to it of a certified copy of such decision.

(h) In all proceedings before the Industrial Board, or in a court under the compensation provisions of this act,

the costs shall be awarded and taxed as provided by law in ordinary civil actions in the circuit court.

(i) The power and jurisdiction of the Industrial Board over each case shall be continuing, and, from time to time, it may, upon its own motion, or upon the application of either party, on account of a change in conditions, make such modification or change in the award, ending, lessening, continuing or extending the payments previously awarded, either by agreement or upon hearing, as it may deem just, subject to the maximum and minimum provided for in this act. When compensation which is payable in accordance with an award or settlement contract approved by the Industrial Commission, is ordered paid in a lump sum by the Commission, no review shall be had as in this paragraph mentioned.

Upon making any such change, the Board shall immediately send to each of the parties a copy of the modified award. No such modification shall affect the previous award as to any money paid thereunder.

The Board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after the expiration of two (2) years from the last day for which compensation was paid under the original award made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the 1st day for which compensation was paid. The Board may at any time correct any clerical error in any finding or award.

(j) The Board or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of

the employee and to testify in respect thereto. Such physician or surgeon shall be allowed traveling expenses and a reasonable fee, to be fixed by the Board. The fees and expenses of such physician or surgeon shall be paid by the state only on special order of the Board or a member thereof.

(k) The Board, or any member thereof may, upon the application of either party or upon its own motion, appoint a disinterested and duly qualified industrial hygienist, industrial engineer, industrial physician, or chemist, to make any necessary investigation of the occupation in which the employee alleges that he was last exposed to the hazards of the occupational disease claimed upon, and testify with respect to the occupational disease health hazards found by such person or persons to exist in such occupation. Such person or persons shall be allowed traveling expenses and a reasonable fee, to be fixed by the Board. The fees and expenses of such persons shall be paid by the state, only on special order of the Board or a member thereof.

(*l*) Whenever any claimant misconceives his remedy and files an application for adjustment of a claim under "The Indiana Workmen's Compensation Act of 1929" and amendments thereto, and it is subsequently discovered, at any time before the final disposition of such cause, that the claim for injury or death which was the basis for such application should properly have been made under the provisions of this act, then the application so filed under "The Indiana Workmen's Compensation Act of 1929" and amendments thereto, may be amended in form or substance or both to assert a claim for such disability or death under the provisions of this act, and it shall be deemed to have been so filed as amended on the date of the original filing thereof, and

such compensation may be awarded as is warranted by the whole evidence pursuant to the provisions of this act. When such amendment is submitted, further or additional evidence may be heard by the Industrial Board when deemed necessary. Nothing in this section contained shall be construed to be or permit a waiver of any of the provisions of this act with reference to notice or time for filing a claim, but notice of filing of a claim, if given or done, shall be deemed to be a notice or filing of a claim under the provisions of this act, if given or done within the time required herein. (*Formerly: Acts 1937, c.69, s.20; Acts 1947, c.164, s.8; Acts 1963, c.388, s.15; Acts 1969, c.101, s.4*).

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22-3-7-31 Awards; working after contracting disease; waiver of provisions

Sec. 31. No employee, personal representative, or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employee, personal representative or beneficiary hereunder except after approval by the Industrial Board; but any employee who, prior to the taking effect of this act, has contracted silicosis or asbestosis but is not disabled therefrom, may, within sixty (60) days after the taking effect of this act, file with the Industrial Board a request for permission to waive full compensation on account of disability or death resulting from silicosis or asbestosis, or any direct result thereof, supported by medical evidence satisfactory to the Industrial Board, that he has actually contracted silicosis or asbestosis but is not disabled therefrom, and if the Industrial Board shall approve such waiver, the compensation payable for such resulting disability or death of such employee, after further exposure in the

employment of any employer who has elected pursuant to the provisions of subsections (a) and (b) of section four of this act, shall be fifty per cent (50 per cent) of the compensation which but for such waiver would have been payable by any such employer. (*Formerly: Acts 1937, c. 69, s. 24*).

22-3-7-32 Actions and proceedings; notice; limitation of actions

Sec. 32. (a) No proceedings for compensation under this act shall be maintained unless notice has been given to the employer of disablement arising from an occupational disease as soon as practicable after the date of disablement. No defect or inaccuracy of such notices shall be a bar to compensation unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy.

(b) That notice provided for in the preceding subsection shall state the name and address of the employee, the nature and cause of the occupational disease and disablement or death therefrom, and shall be signed by the disabled employee, or by someone in his behalf, or by one or more of the dependents, in case of death, or by some person in their behalf. Such notice may be served personally upon the employer, or upon any foreman, superintendent or manager of the employer to whose orders the disabled or deceased employee was required to conform or upon any agent of the employer upon whom a summons in a civil action may be served under the laws of the state, or may be sent to the employer by registered letter, addressed to his last known residence or place of business.

(c) No proceedings by an employee for compensation under this act shall be maintained unless claim for

compensation shall be filed by the employee with the Industrial Board within two (2) years after the date of the disablement.

No proceedings by dependents of a deceased employee for compensation for death under this act shall be maintained unless claim for compensation shall be filed by the dependents with the Industrial Board within two (2) years after the date of death.

No limitation of time provided in this act shall run against any person who is mentally incompetent or a minor dependent, so long as he has no guardian or trustee. (*Formerly: Acts 1937, c.69, s.25; Acts 1955, c.195, s.2*).

22-3-7-33 Exposure; presumptions; joint employers

Sec. 33. (a) An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists. The employer liable for the compensation provided for in this act shall be the employer in whose employment the employee was last exposed to the hazards of the occupational disease claimed upon regardless of the length of time of such last exposure: Provided, That in cases of silicosis or asbestosis, the only employer liable shall be the last employer in whose employment the employee was last exposed during the period of sixty (60) days or more to the hazard of such occupational disease, and, in such cases, an exposure during a period of less than sixty (60) days, shall not be deemed a last exposure. The insurance carrier liable shall be the carrier whose policy was in effect covering the employer liable on the last day of the

exposure rendering such employer liable, in accordance with the provisions of this act.

(b) Whenever any employee for whose disability or death compensation is payable under this act shall, at the time of the last exposure, be exposed in the joint service of two (2) or more employers subject to the compensation provisions of this act, such employers shall contribute to the payment of such compensation in proportion to their wage liability to such employees. Nothing in this section shall prevent any reasonable arrangements between such employers for a different distribution as between themselves of the ultimate burden of compensation. (*Formerly: Acts 1937, c. 69, s. 26; Acts 1957, c. 353, s. 3*).

* * *

22-3-7-36 Third parties; actions to recover damages; subrogation, limitation of actions

Sec. 36. Whenever disablement or death from an occupational disease arising out of and in the course of the employment for which compensation is payable under this chapter, shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee, or his dependents, in case of death, may commence legal proceedings against such other prson to recover damages notwithstanding such employer's or such employer's occupational disease insurance carrier's payment of, or liability to pay, compensation under this chapter. In such case, however, if the action against such other person is brought by the injured employee or his dependents and judgment is obtained and paid and accepted and settlement is made with such other person, either

with or without suit, then from the amount received by such employee or dependents there shall be paid to the employer, or such employer's occupational disease insurance carrier, the amount of compensation paid to such employee or dependents, plus the medical, hospital and nurses' services and supplies and burial expense paid by the employer or such employer's occupational disease insurance carrier, and the liability of the employer or such employer's occupational disease insurance carrier to pay further compensation or other expenses shall thereupon terminate, whether or not one or all of the dependents are entitled to share in the proceeds of the settlement or recovery and whether or not one or all of the dependents could have maintained the action or claim for wrongful death.

In the event such employee or his dependents, not having received compensation or medical, surgical, hospital or nurse's services and supplies or death benefits, or such employer's occupational disease insurance carrier, shall procure a judgment against such other party for disablement or death from an occupational disease arising out of and in the course of the employment, which judgment is paid, or if settlement is made with such other person, either with or without suit, then, in such event, the employer or such employer's occupational disease insurance carrier shall have no liability for payment of compensation or for payment of medical, surgical, hospital or nurse's services and supplies or death benefits whatsoever, whether or not one or all of the dependents are entitled to share in the proceeds of settlement or recovery and whether or not one or all of the dependents could have maintained the action or claim for wrongful death.

In the event an employee, or in the event of his death, his dependents, shall procure a final judgment against

such other person other than by agreement, for disablement or death from an occupational disease arising out of and in the course of the employment and such judgment is for a lesser sum than the amount for which the employer or such employer's occupational disease insurance carrier is liable for compensation and for medical, surgical, hospital and nurse's services and supplies, as of the date the judgment becomes final, then the employee, or in the event of his death, his dependents, shall have the option of either collecting such judgment and repaying the employer or such employer's occupational disease insurance carrier for compensation previously drawn, if any, and repaying the employer or such employer's occupational disease insurance carrier for medical, surgical, hospital and nurse's services and supplies previously paid, if any, and of repaying the employer or such employer's occupational disease insurance carrier, the burial benefits paid, if any, or of assigning all rights under said judgment to the employer or such employer's occupational disease insurance carrier and thereafter receiving all compensation and medical, surgical, hospital and nurse's services and supplies to which the employee, or in the event of his death, to which his dependents would be entitled if there had been no action brought against such other party.

If the employee or his dependents shall agree to receive compensation, because of an occupational disease arising out of and in the course of the employment, from the employer or such employer's occupational disease insurance carrier, or to accept from the employer or such employer's occupational disease insurance carrier by loan or otherwise, any payment on account of such compensation or institute proceedings to recover the same, the

said employer or such employer's occupational disease insurance carrier shall have a lien upon any settlement award, judgment or fund out of which such employee might be compensated from the third party.

Said employee, or in the event of his death, his dependents, shall institute legal proceedings against such other person for damages within two (2) years after said cause of action accrues. If, after said proceeding is commenced, the same is dismissed, the employer or such employer's occupational disease insurance carrier, having paid compensation or having become liable therefor, may collect in their own name or in the name of the disabled employee, or in the case of death, in the name of his dependents, from the other person in whom legal liability for damages exists, the compensation paid or payable to the disabled employee or his dependents, plus such medical, surgical, hospital, and nurse's services and supplies and burial expense paid by the employer or such employer's occupational disease insurance carrier for which they have become liable. The employer or such employer's occupational disease insurance carrier may commence such action at law for such collection against the other person in whom legal liability for damages exists, not later than one (1) year from the date said action so commenced, has been dismissed, notwithstanding the provisions of any statute of limitations to the contrary.

If said employee or in the event of his death, his dependents, shall fail to institute legal proceedings, against such other person for damages within two (2) years after said cause of action accrues, the employer or such employer's occupational disease insurance carrier, having paid compensation or having been liable therefor, may collect in their own name or in the name of the disabled

employee, or in the case of his death, in the name of his dependents, from the other person in whom legal liability for damage exists, the compensation paid or payable to the disabled employee or to his dependents, plus the medical, surgical, hospital and nurse's services and supplies and burial expenses, paid by them or for which they have become liable, and the employer or such employer's occupational disease insurance carrier may commence such action at law for such collection against such other person in whom legal liability exists at any time within one (1) year from the date of the expiration of the two (2) years when said action accrued to said disabled employee or, in the event of his death, to his dependents, notwithstanding the provisions of any statute of limitations to the contrary.

In such actions brought as hereinabove provided by the employee or his dependents, he or they shall within thirty (30) days after such action is filed, notify the employer or such employer's occupational disease insurance carrier by personal service or registered mail, of such fact and the name of the court in which suit is brought, filing proof thereof in such action.

If the employer does not join in said action as hereinafter provided within ninety (90) days after receipt of said notice then, out of any actual money reimbursement received by the employer or such employer's occupational disease insurance carrier pursuant to this section, they shall pay their pro rata share of all costs and reasonably necessary expenses in connection with such third party claim, action or suit and to the attorney at law selected by the employee or his dependents, a fee of twenty-five per cent (25%), if collected without trial, of the amount of benefits shall consist of the

amount of reimbursements, after the expenses and costs in connection with such third party claim have been deducted therefrom, and a fee of thirty-three and one-third per cent (33 1/3%), if collected after trial, of the amount of such benefits after deducation of said costs and reasonably necessary expenses in connection with such third party claim, action or suit. The employer may, within ninety (90) days after receipt of notice of suit from the employee or his dependents, join in said action upon his motion so that all orders of court after hearing and judgment shall be made for his protection.

No release or settlement of claim for damages by reason of such injury or death, and no satisfaction of judgment in such proceedings shall be valid without the written consent of both employer or such employer's occupational disease insurance carrier, and employee, or his dependents, except, in the case of the employer or such employer's occupational disease insurance carrier, such consent shall not be required where said employer, or such employer's occupational disease insurance carrier has been fully indemnifiied or protected by court order. (*Formerly: Acts 1937, c.69, s.29; Acts 1963, c.388, s.17; Acts 1969, c.101, s.5; Acts 1974, P.L.109, SEC.7*).

* * *

22-3-7-38 Application of law

Sec. 38. No repeal of any act or part thereof herein contained shall extinguish or in any way affect any right of action thereunder, existing at the time this act takes effect; and no employer shall be liable for compensation or damages under the provisions of this act in any case in which the disablement on which claim is predicated shall have occurred prior to the date this act becomes

effective; but nothing contained in this section shall affect any case in which exposure as defined in this act shall have taken place after the effective date of this act. (*Formerly: Acts 1937, c. 69, s. 32*).

APPENDIX I

INDIANA CONSTITUTIONAL PROVISIONS

§12. Courts open; remedy by due course of law; administration of justice

Section 12. All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

* * *

§23. Equal privileges

Section 23. The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

APPENDIX J

U.S. CONSTITUTIONAL PROVISIONS

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 82-1243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD D. BUNKER,

Appellant,

VS.

NATIONAL GYPSUM COMPANY,

Appellee.

On Appeal From The
Supreme Court Of Indiana

MOTION TO DISMISS APPEAL
Or In The Alternative
TO AFFIRM JUDGMENT

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QUESTIONS PRESENTED

Whether this appeal should be dismissed for failure to present a substantial Federal question in light of the fact that this Court has previously rejected similar due process and equal protection challenges to statutory limitations of actions?

Whether the decision of the Supreme Court of Indiana should be affirmed in light of the fact that it is consistent with prior decisions of this Court upholding statutory limitation of action provisions despite due process and equal protection challenges?

PARTIES APPEARING

RICHARD D. BUNKER
Plaintiff-Appellant

NATIONAL GYPSUM COMPANY
Defendant-Appellee

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MOTION TO DISMISS APPEAL
Or In The Alternative
TO AFFIRM JUDGMENT

Pursuant to Rule 16, paragraphs 1(b) and 1(c) of the Revised Rules of this Court, appellee moves that this appeal be dismissed or, alternatively, that the judgment of the Supreme Court of Indiana be affirmed.

OPINIONS BELOW

Bunker v. National Gypsum Company, ... Ind. ..... 441 N.E.2d 8 (1982) (Appendix A, pages 1a-25a in Appellant's Jurisdictional Statement).

Bunker v. National Gypsum Company, ... Ind. App. ....., 426 N.E.2d 442 (1981) (Appendix C, pages 27a-37a in Plaintiff's Jurisdictional Statement).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves:

2) United States Constitution:

U.S. Const. amend. V;
U.S. Const. amend. XIV, § 1.

b) Indiana Constitution:

Ind. Const. art. I, § 12;
Ind. Const. art. I, § 23.

c) Statutes of the State of Indiana: 1937 Ind. Acts, Ch. 69, found within: Indiana Code § 22-3-7-1, *et seq.* (Burns 1974), specifically:

Ind. Code Section 22-3-7-9 (Burns 1974);
Ind. Code Section 22-3-7-32(c) (Burns 1974).

All pertinent parts are contained verbatim at Appendices H through J, pages 53a through 91a in Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

This is a direct appeal from a decision of the Indiana Supreme Court holding the Statute of Limitations provisions of Indiana's Workmen's Occupational Diseases Act (hereinafter referred to as the Act) constitutional. Appellant's Jurisdictional Statement raises issues of due process and equal protection before this Court.

Appellant was denied compensation benefits for alleged disability due to the inhalation of asbestos fibers because his claim was filed twenty-seven years after the expiration of the limitations of actions provisions of the Act. Appellant was employed by Appellee in February of 1949 and was last exposed to asbestos in the workplace in November of 1950. He continued in defendant's employ until March, 1966, when he left for better employment with Grain Processing Corporation of Muscatine, Iowa.

Appellant filed a claim for disability under Indiana's Occupational Diseases Act, Ind. Code § 22-3-7-1, *et seq.* (Burns 1974), on June 17, 1978 stating he had been diagnosed as suffering from asbestosis in July of 1976.

Appellant appeared before a Hearing Member of the Industrial Board of Indiana on October 2, 1980. Appellant testified at the time of the hearing to the facts set out above and stated that he was then still employed by Grain Processing. Appellant's claim was dismissed for the reason that his claimed disability had not arisen within three (3) years of the date of last exposure as required by the time limitations provisions of the Act. Ind. Code § 22-3-7-9(f). That decision was adopted by the full Industrial Board of Indiana.

The Indiana Court of Appeals found the statute of limitations provision unconstitutional by a two to one majority and reversed the Industrial Board. Appellee was granted a Petition to Transfer to the Indiana Supreme Court, which found the Court of Appeals in error, vacated their opinion, and affirmed the Industrial Board's dismissal of appellant's claim. Appellant has now filed a Jurisdictional Statement in the Supreme Court of the United States challenging the constitutionality of Indiana's Act under the due process and equal protection provisions of the Constitution of the United States.

The statute of limitations provisions of the Act generally provide that disability must occur within two (2) years after the last exposure to the hazards of the disease which caused the claimant's disability. In the case of diseases "caused by the inhalation of silica dust or asbestos dust" this period is extended to three (3) years. Ind. Code § 22-3-7-9(f) (Burns 1974).

Compensation is further conditioned on the requirement that an action for compensation must be brought within two (2) years of the date of disability. The relevant section also included a "tolling provision" which tolls the statute for mental incompetents or minor dependents without guardians or trustees. Ind. Code § 22-3-7-32(c) (Burns 1974).

In combination, the provisions cited afforded the appellant a maximum of five years, unless extended by the tolling provision, in which to bring an action for disability for asbestosis following his last exposure in 1950. Appellant argues that these limitations of actions provisions abridge his Constitutional rights of due process and equal protection in barring the claim he filed with the Industrial Board more than twenty-seven years subsequent to his last exposure to asbestos.

SUMMARY OF ARGUMENT

Appellee moves this Court to dismiss this appeal for the reason that it fails to raise a substantial Federal question. Under prior decisions of this Court statutes of limitations have been upheld despite challenges based on equal protection and due process. This action does not differ from those of prior cases and the issues presented here are, therefore, foreclosed by those cases.

Appellee also urges dismissal on the basis that the Federal question sought to be reviewed is not properly raised inasmuch as appellant lacks the disability which would entitle him to compensation even if he were not time-barred by the statute of limitations. Accordingly the "case or controversy" requirement is not met, in that appellant lacks standing.

In the alternative, appellee moves the Court to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Statutes of limitation do not violate due process requirements of the Constitution if the time provided for bringing an action is reasonable. In this case the provisions of Indiana's Workmen's Compensation Act meet the test of reasonableness. Indiana's Act does not violate the equal protection provisions of the Constitution. In cases which do not involve a fundamental right or suspect classification the challenged statute meets the test of constitutionality as long as there is a reasonable basis for any classifications made by the Act. The classifications made by Indiana's Act meet this test of constitutionality.

ARGUMENT

I. MOTION TO DISMISS.

A. Appellee Moves The Court To Dismiss This Appeal For The Reason That It Does Not Present A Substantial Federal Question.

Appellant challenges the statute of limitations provisions of Indiana's Act on equal protection and due process grounds. These constitutional questions are not substantial and appellant's action should be dismissed. *See, e.g., Martin v. Walton*, 368 U.S. 25 (1961); *Zucht v. King*, 260 U.S. 174 at 176 (1922); *Steinhardt v. Johns-Manville Corp.*, 78 A.D.2d 577, *aff'd*, 55 N.Y.2d 1008, 430 N.E.2d 1297, 445 N.Y.S.2d 244, amended 55 N.Y.2d 802, 432 N.E.2d 139, 447 N.Y.S.2d 437 (1981), *cert. denied and appeal dismissed, sub nom. Rosenberg v. Johns-Manville Sales Corp.*, ... U.S. ....., 102 S.Ct. 2226, (1982); *Anderson v. Wagner*, 79 Ill.2d 295, 402 N.E.2d 560 (1979), *appeal dismissed sub nom. Woodward v. Burnham City Hospital*, 449 U.S. 807 (1980); *Thompson v. Thompson*, 285 Md. 488, 404 A.2d 269, *appeal dismissed*, 444 U.S. 1062 (1979). Appellant in a single sentence in his jurisdictional statement argues without citation of authority that a substantial Federal question is raised because the limitation period as applied in this case deprived appellant of a remedy before his right had accrued.

It has long been settled that the mere assertion of a Federal question will not suffice to provide jurisdiction. The existence of a real and substantive issue is essential to avoid a motion to dismiss. These principles have long been established and were discussed in *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902). That case came before this Court on a writ of error to review a

decision of the Supreme Court of the territory of Hawaii affirming a trial court judgment for plaintiff on a life insurance policy. Appellant had raised the due faith and credit clause of the constitution in defense of the action at trial. The evidence on that issue had been rejected by the trial court, and the Hawaii Supreme Court affirmed finding the issue was without merit. In granting dismissal this opinion of the Court said:

> [T]he doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy, the motion to dismiss will prevail.

187 U.S. at 311.

This Court also dismissed an appeal raising constitutional questions in *Deming v. Carlisle Packing Company*, 226 U.S. 102 (1912) where Justice White said:

> In view, however of the well-settled and, indeed, now elementary doctrine that although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal question is of such an unsubstantial character as to cause it to be devoid of all merit, and therefore frivolous, we think it is our duty to grant a motion to dismiss which has been here made.

226 U.S. at 105.

These cases make it perfectly clear that dismissal is appropriate where the constitutional issues raised are devoid of merit and unsubstantial. The mere assertion of constitutional issue is not sufficient to confer jurisdiction.

As in *Deming* and *Equitable*, this appeal presents issues which are unsubstantial and without merit and it should be dismissed. The issues raised herein have been considered and resolved in prior actions which have upheld the validity of limitation of actions despite similar constitutional challenges. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Steinhardt v. Johns-Mansville Corp.*, 54 N.Y.2d 1008, 430 N.E.2d 1197 (1981), *amendment granted*, 55 N.Y.2d 802, 432 N.E.2d 139 (1981), *appeal dismissed*, ... U.S. ....., 102 S. Ct. 2226 (1982); *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979), *appeal dismissed sub nom. Woodward v. Burnham City Hospital*, 449 U.S. 807 (1980). These cases foreclose the issues presented here and render further discussion of these issues unnecessary.

The favored status of statutes of limitations is evidenced by this Court's comments in *Wood v. Carpenter*, 101 U.S. 135, at 139 (1879):

> Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

In the more recent case of *Board of Regents v. Tomanio*, 446 U.S. 478, at 487 this Court stated:

> On many prior occasions, we have emphasized the importance of the policy underlying state statutes of limitations. Statutes of limitations are not simply

> technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system.

Thus in the judgment of both legislatures and courts, statutes of limitations prevent the litigation of fraudulent or stale claims and permit settled expectations. In accomplishing these goals certain meritorious claims may be barred without violation of the constitutional right to due process and equal protection.

Nevertheless, appellant urges the Court to consider this particular appeal and argues that it presents a substantial Federal question because his claim was barred before it actually accrued. In fact, appellant had no viable claim. (See Section I.B. of this brief.) Nevertheless, his argument does not raise the issue in this appeal to the status of a substantial Federal question. Commenting on this very issue of unavoidable delay this Court in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), at 314 stated:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the Courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of R. Telegraphers v. Railway Exp. Agency*, 321 U.S. 342, 349, 99 L.ed. 788, 792, 64 S. Ct. 582. *They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay.* They have come into the law not through the judicial process but through legislation. They represent public policy about the privilege to litigate. (Footnote omitted; emphasis added).

This comment makes it clear that statutes of limitations will by design bar action even in cases such as appellant's where the delay is unavoidable because the injury is not yet discovered. That fact does not, as *Chase* suggests,' render the statute unconstitutional.

In *Thompson v. Thompson*, 285 Md. 488, 404 A.2d 269, *appeal dismissed*, 444 U.S. 1062 (1979), this Court dismissed an appeal for want of a substantial Federal question despite the assertion of an issue of unavoidable delay similar to that which appellant raises in this case. In that matter a minor child challenged the constitutionality of a portion of Maryland's Code which required any action to establish paternity of an illegitimate child to be commenced during the pregnancy of the mother or two years after the birth of such child. The *Thompson* child was born on May 10, 1969, and on December 1, 1971, her mother filed a paternity action against the alleged father. The father answered and defended on the basis that the action was barred by the applicable statute of limitations. The minor challenged the constitutionality of the statute raising due process and equal protection arguments.

With respect to the due process issue the minor advanced precisely the same argument espoused by the appellant herein. The minor argued that the two year statute of limitations would extinguish her remedy before she had any real opportunity to assert it. She argued that although her mother was permitted to institute a paternity proceeding in her behalf she might have a continuing fondness for the father, a reluctance to publicly reveal her indiscretion or other reasons which would militate against her bringing an action. In rejecting the due process argument made by the minor the Maryland Court of Appeals quoted with approval from the lower court as follows:

> Certainly, we feel that it is reasonable for the legislature to conclude that this policy decision, when coupled with the State's legitimate interest in preventing stale or fraudulent claims, on balance, outweighs the potential harm to illegitimate children who may have their right to paternal support forfeited by the mother's inaction.

404 A.2d at 273.

Following the decision of the Maryland Court the minor appealed to the United States Supreme Court and that appeal was dismissed for want of substantial Federal question. 444 U.S. 1062.

Thompson v. Thompson is further persuasive authority that appellant's due process and equal protection challenges to Indiana's statute of limitations are foreclosed by prior cases. It stands as additional authority for the proposition that the legislature is entitled to exercise its judgment in establishing periods of limitations as long as they are reasonable. The mere fact that a remedy may be extinguished by a statute of limitations before a cause of action accrues does not render the statute of limitations unconstitutional. As evidenced by the *Thompson* case the states have a legitimate interest in preventing stale and unjust claims.

Steinhardt v. Johns-Manville Corp., 78 A.D.2d 577, *appeal dismissed, cert. denied*, ... U.S. ....., 102 S. Ct. 2226 (1982), involved a fact situation identical to the instant action and discussed those issues raised by the appellant herein. The *Steinhardt* case consolidated several plaintiffs' actions. Each of the plaintiffs asserted injuries caused by the inhalation of asbestos particles, and all plaintiffs had commenced negligence actions more than four (4) years after their last employment-related exposure to asbestos.

The defendants were granted summary judgment which gave rise to appeals ultimately terminating in the United States Supreme Court. In an effort to avoid the statute of limitations defense the plaintiffs/appellants urged the Court to adopt the position that the statute of limitations period should run from the date on which the defense was or could have been discovered. Under New York law, as in the Indiana statute, the statutory period began to run from the date of plaintiffs' last exposure to asbestos. The New York Court of Appeals refused to adopt that position and affirmed the motion for summary judgment. On motion by the plaintiffs the Court of Appeals of New York granted remittitur and amended its findings to hold that the United States constitutional issue of due process had been presented and was necessarily passed on. Appeal to this Court followed. In a memorandum decision on May 17, 1982, this Court dismissed the appeal for want of jurisdiction and, treating the papers presented as a petition for certiorari, denied the petition.

As in the instant action, the appellants in *Steinhardt v. Johns-Manville* took the position that the statute of limitations which began to run from the date of last exposure deprived them of due process of law. The argument advanced in *Steinhardt* is the same as that espoused by the appellant herein. *Steinhardt, et al.*, argued that the statutory period barred an action before plaintiffs learned that they had sustained injuries as a result of their asbestos exposure. Despite those arguments this Court denied certiorari.

The *Steinhardt* decision is further authority that the appellant fails to present a substantial Federal question. The issues presented by this appeal have been considered by this Court in prior cases and are foreclosed by these

decisions which are consistent with the holding of the Indiana Supreme Court in this action. *Deming v. Carlisle Packing Co.*, 226 U.S. 102 (1912).

Anderson v. Wagner, 79 Ill. 2d 295, 402 N.E.2d 560 (1979), *appeal dismissed, sub nom. Woodward v. Burnham City Hospital*, 449 U.S. 807 (1980), also provides additional authority that the issues raised by this appeal fail to present a substantial Federal question. In *Anderson* the Illinois Supreme Court affirmed a decision upholding the constitutionality of a special limitation period for medical malpractice actions against physicians and hospitals. The act at issue provided a two year period for bringing medical malpractice actions based on tort or contract. The two year period began to run after the date on which the claimant knew or should have known of the existence of the injury or death for which damages are sought. The statute further provided that no action should be brought more than four years after the date on which the act or omission complained of occurred.

The plaintiffs in this consolidated appeal contended that the statute of limitations at issue violated the due process and equal protection clauses of the Federal constitution. Plaintiffs argued that a cause of action might be barred by the four year maximum time limit before a person learned of his injury. The Illinois Supreme Court upheld the statute commenting that while the result may seem harsh the reasonableness of the statute must be judged in light of the circumstances confronting the legislature and the end which it sought to accomplish.

The argument raised by the appellant in *Anderson v. Wagner* is precisely the same as that advanced by the appellant herein. This Court dismissed *Anderson* for want of a substantial Federal question.

In support of his jurisdictional statement, appellant contends that the findings of the Supreme Court of the State of Indiana are in conflict with rulings by the Supreme Courts of other states. In support of his contention, he cites three cases: *Diamond v. E.R. Squibb & Sons, Inc.*, ... Fla. ....., 397 So.2d 671 (1981); *Lankford v. Sullivan*, ... Ala. ....., 416 So.2d 996 (1982); *Pepsi Cola Bottling Company v. Long*, ... Miss. ....., 362 So.2d 182 (1978).

In *Diamond*, the Supreme Court of Florida struck down Florida's products liability limitations as it applied to a manufacturer of diethylstilbestrol (DES). The specific holding in the case was that the statute violated Article I, §21, of the Florida Constitution, which guarantees access to Florida's courts. *Diamond* is clearly decided solely upon state grounds and no mention of due process or Federal constitutional questions appears in the case.

Lankford is similar in that it strikes down an Alabama products liability statute of limitations as violative of §13 of the Alabama constitution, a general prohibition against arbitrary and capricious governmental action. Again, no mention is made of a Federal constitutional question and the case appears to have been decided entirely upon State constitutional grounds.

In *Pepsi Cola Bottling Company of Tupelow, Inc. v. Long, supra*, the Mississippi Supreme Court interpreted the statute of limitations provision of Mississippi's workmen's compensation laws as not barring plaintiff's claim. The statute of limitations in *Pepsi Cola* was not struck down, but rather interpreted consistent with State precedents to include a discovery provision for latent compensable injuries. This case makes no mention of constitutional law, either State or Federal, but simply interprets Mississippi's workmen's compensation statute.

Even if appellant is correct and could properly demonstrate that states differ regarding similar statutory provisions, exercise of Supreme Court jurisdiction would not be required. Appeals have often been dismissed for lack of a substantial Federal question even though different states have come to opposite conclusions regarding similar state statutes. *Thomas v. New York*, 444 U.S. 891 (1979); *Hill v. Garner*, 434 U.S. 989 (1977).

B. Appellee Moves To Dismiss The Appeal For The Reason That Appellant Lacks The Standing Necessary To Fulfill the Case Or Controversy Requirement Of Article III.

Appellant lacks standing to challenge Indiana's Act because at the time of the hearing before the Industrial Board he was not disabled and under the terms of the Act was not entitled to compensation. Appendix A to Appellant's Jurisdictional Statement, p. 18a; *see, e.g., Flast v. Cohen*, 392 U.S. 83 (1942); *Data Processing Service v. Camp*, 397 U.S. 150 (1969); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). As this Court has held:

> Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions. . . . [C]oncrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.

Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221 (1974).

As Justice Hunter stated in his dissent in this case:

> The non-constitutional grounds upon which this court should have disposed of this case are readily apparent in the record; there, it is revealed that claimant Bunker was not "disabled" at the time of the

hearing and therefore was not eligible for benefits under the Occupational Disease Act.

Appendix A to Appellant's Jurisdictional Statement, at p. 18a.

Justice Hunter's dissent recounts in its entirety the cross-examination of appellant which established his lack of disability at the time of his hearing. Appendix A, at p. 19a.

To meet the case or controversy requirement, a plaintiff seeking to challenge a statute must allege, "specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975). "When a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). As Justice Hunter notes, appellant in this case has not shown an injury to himself that is likely to be redressed by a favorable decision. Lacking the personal stake in the outcome which is requisite to standing, appellant's pleading in this Court should be dismissed.

II. MOTION TO AFFIRM

A. Indiana's Occupational Disease Act Does Not Violate The Due Process Provisions Of The U.S. Constitution.

Appellant argues that the time within which an action for disablement must be brought is too short and thus

violates due process. It has long been settled law that statutes of limitation do not violate due process as long as there is a reasonable time provided for the bringing of an action. *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913); *United States v. F. & G. Co. v. U.S. Use of S.W. Co.*, 209 U.S. 306 (1908). The Legislature has the sole duty and responsibility to determine what constitutes a reasonable period unless the time allowed is so manifestly insufficient that it becomes a denial of justice. *Wilson v. Iseminger*, 185 U.S. 55 (1902); *Antoni v. Greenhow*, 107 U.S. 769 (1883).

In the construction of its workmen's compensation laws, the Indiana Legislature has attempted to provide a remedy which balances the interests of society in compensating persons who may have job-related diseases and the need to protect defendants from stale or fraudulent claims. Recognizing the longer latency period of lung-related occupational diseases, the legislature has extended from the normal two years to three years the period during which disability must arise. A claimant then has an additional two years from the date of disability in which to bring his claim, unless further extended by the tolling provisions.

It should be apparent that this five year period from date of last exposure until a claimant is time-barred is a reasonable time and not so manifestly insufficient as to constitute a denial of due process. Appellant's attempt to require the Courts to consider, and his former employer to defend, a claim which lapsed in 1955 illustrates the basic reasons for statutes of repose. Accordingly, even if a substantial federal question is deemed to exist, the judgment of the court below should nevertheless be affirmed.

The standard of review to be applied where statutes of limitations are challenged on due process grounds was

set out in *Terry v. Anderson*, 95 U.S. 628 (1877), where Chief Justice Waite stated:

> This Court has often decided that statutes of limitations affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. . . .
>
> In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of government unless a palpable error has been committed.

95 U.S. at 632-633.

The *Terry v. Anderson* decision makes it clear that this Court will defer to the judgment of the legislature where periods of limitation provided a reasonable time for actions to be brought. Appellant, therefore, bears a heavy burden to show that the five year period provided by Indiana's Occupational Disease Act is unreasonable. *Toombs v. Citizen's Bank of Waynesboro*, 281 U.S. 643 (1930). Plaintiff's only argument in that regard is that the limitations period may in some cases bar actions before potential plaintiffs are aware of their injuries. This fact does not make the period provided by the Indiana legislature unreasonable as evidenced by the above discussion of *Steinhardt v. Johns-Manville*, *Thompson v. Thompson*, and *Anderson v. Wagner*. *See also Texaco Inc. v. Short*, 454 U.S. 516 (1982).

The provisions of Ind. Code § 22-3-7-9(f) which grant special treatment to workers exposed to silica dust or asbestos dust, show that the legislature recognized that the latency period associated with this particular disease might be longer than other diseases. Moreover, the In-

diana Legislature has amended the Act on twenty-four separate occasions since 1937.[1] This legislative history shows a continuing interest by the Legislature in all aspects of the Occupational Disease Act, including the statute of limitation provisions. By the Acts of 1955, ch. 195, § 1, a one (1) year period of limitation was increased to two (2) years in subsection (f) and (g) of Ind. Code 22-3-7-9. By the Acts of 1961, a proviso relating to "occupational disease caused by exposure to radiation" was added to Ind. Code 22-3-7-9(f). By the Acts of 1974, p. 1, 109, sec. 3, "coal dust" was included with silica dust and asbestos dust permitting a claim within three (3) years of last exposure. Ind. Code 22-3-7-9(f). Thus, the Legislature has had ample opportunity to reconsider its three (3) year period of limitation and provide a longer period if it chose to do so. Numerous medical articles and studies have been published since the passage of the Occupational Disease Act and were available for consideration by the Legislature at the time of the many amendments to the Act.[2]

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[1] The Act was passed and enacted into law as found in Acts 1937, ch. 69, § 1 *et seq.* Amendments were made as follows: Acts 1943, ch. 115, § 1, 2; Acts 1943, ch. 248, § 1; Acts 1945, ch. 290 § 1, 2; Acts 1947, ch. 164, § 1-8; Acts 1949, ch. 242, § 1-3; Acts 1951, ch. 250, § 1-3; Acts 1953, ch. 174, § 1; Acts 1955, ch. 131, § 1; Acts 1955, ch. 195, § 1, 2; Acts 1955, ch. 241, § 1; Acts 1955, ch. 276, § 1; Acts 1955, ch. 326, § 1; Acts 1957, ch. 353, § 1-3; Acts 1959, ch. 266, § 1; Acts 1959, ch. 359, § 1; Acts 1961, ch. 240, § 1; Acts 1961, ch. 312, § 1; Acts 1963, ch. 48, § 206, § 1, 2; Acts 1967, ch. 313, § 1, 2; Acts 1969, ch. 101, § 1-5; Acts 1971, P.L. 354, Sec. 1-3; Acts 1974, P.L. 109, Sec. 1-8; Acts 1975, P.L. 235, Sec. 5; Acts 1976, P.L. 122, Sec. 4-6; Acts 1977, P.L. 261, Sec. 4-6; Acts 1978, P.L. 2, Sec. 2212-2214; Acts 1979, P.L. 17, Sec. 34; Acts 1979, P.L. 227, Sec. 5, 6; Acts 1979, P.L. 228, Sec. 2; Acts 1981, P.L. 11, Sec. 126.

[2] Among these, see Dreeseen, *A Study of Asbestosis in the Asbestos Textile Industry*, Pub. Health Bull. No. 241, August,

(Footnote continued on following page)

Accordingly, compensation is granted for asbestos-related disability which arises within three years of last exposure instead of the two year period granted for other diseases. The plaintiff simply argues that this is not enough time and asks this Court to change the time period. It is not the role of this Court to substitute its judgment for that of the legislature by further increasing the statutory period provided in the Act. *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Smith v. Government of Virgin Islands*, 329 F.2d 135, *appealed* 361 F.2d 469, *cert. denied sub nom. Smith v. Virgin Islands*, 377 U.S. 979, *reh. denied* 379 U.S. 872 (1964). The appropriate forum for any such change is the Indiana legislature and not this Court.

B. Indiana's Occupational Disease Act Does Not Violate The Equal Protection Provisions Of The U.S. Constitution.

Appellant also challenges the statute of limitation on equal protection grounds. "In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends." *G.D.*

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[2] *continued*

1938; Holleb and Angrist, *Bronchogenic Carcinoma in Association with Pulmonary Asbestosis*, 18 Am. J. Pathology 123 (1942); Isselbacher, Klaus and Hardy, *Asbestosis and Bronchogenic Carcinoma*, 15 Am. J. of Med. 721 (1953); Smith, *Survey of Some Current British and European Studies of Occupational Tumor Problems*, 5 AMA Arch. Indus. Hygiene 242, corrected 606 (1952); Doll, *Mortality from Lung Cancer in Asbestos Workers*, 12 Brit. J. Indus. Med. 81 (1955).

Searle & Co. v. Cohn, 455 U.S. 404, 102 S.Ct. at 1141. *See also Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). This Court discussed the standard of review in equal protection cases in *Dandridge v. Williams*, 397 U.S. 471 (1970):

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may intensify, if they do not require, rough accommodations—illogical, it may be and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69, 70, 33 S.Ct. 441, 443, 57 L.Ed. 730. "*A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*" *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.

397 U.S., at 485. (Emphasis added).

As noted in *Dandridge*, classifications with some reasonable basis do not violate the Equal Protection Clause, even though inequity may result. Applying this reasonable basis test to other-than-suspect classifications, such as appellant's, the courts have consistently upheld statutes of limitations enacted to ensure that the courts and defendants are not required to litigate stale claims. *Mathews v. DeCastro*, 429 U.S. 181 (1976); *Clark v. Gulesian*, 429 F.2d 405 (1st Cir. 1970), *cert. denied*, 400 U.S. 993 (1971); *Pittman v. U.S.*, 341 F.2d 739 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965).

Appellant has argued that Indiana's Occupational Disease Act creates classifications which violate equal

protection by treating workers exposed to asbestos differently from those exposed to radiation. Appellant also argues that the Act creates a prohibited classification by treating differently those whose disability arises more than 3 years after their last exposure from those continuously exposed. The appellant provides no support for his argument that workers suffering from asbestos and radiation should be treated similarly. The appellant carries a heavy burden to prove the actions of Indiana's legislature in providing different limitations periods for asbestos and radiation exposure did not have a reasonable basis. *Toombs v. Citizen's Bank of Waynesboro*, 281 U.S. 643 (1930).

At no point from the start of this case before the Industrial Board to this date has appellant offered any facts to show that the period of latency for radiation exposure is the same as that for asbestos or that the diseases are in any way similar. The legislature undoubtedly had the benefit of hearings, debates, medical testimony and staff research when drafting Indiana's Workmen's Occupational Diseases Act and when setting the specific limitation periods provided for asbestos and radiation. Even if it is assumed that these diseases have similar latency periods, that fact does not meet appellant's burden to show that the legislative classifications are in violation of equal protection. These classifications enjoy a presumption of constitutionality, *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931), which has not been overcome by appellant. The appellant asks this Court to find the period of limitation unconstitutional without the benefit of any record or challenge to support the claim of improper classification.

CONCLUSION

For all the foregoing reasons, the appellee moves this Court to dismiss this appeal or in the alternative to affirm the judgment of Indiana's Supreme Court.

Respectfully submitted,

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March 24, 1983